

The Open Government Partnership-  
Australia- National Action Plan Stage I<sup>1</sup>  
Submission – Accountability Round Table

## The Accountability Round Table

The Accountability Round Table (ART) is a non-partisan group of citizens with diverse backgrounds (academics, lawyers, politicians, journalists, authors) who are gravely concerned about to take who provided to respond to military (sort the opportunity the current erosion of honesty and integrity in our democracy. ART is dedicated to improving standards of accountability, probity, transparency and democratic practice in all governments and parliaments in Australia.<sup>2</sup> We are committed to the objectives of the Open Government Partnership.

We welcome the opportunity to participate as civil society members in the preparation of Australia's first National Action Plan (NAP) in partnership with the Australian Government.

We thank the Government for the detailed material that has been supplied to the community.

### Introduction

We wish to take up the opportunity to respond to the matters on which feedback has been sought by the Government in the first stage of the preparation of Australia's first NAP.

To do that, we have attempted to take into account the information supplied and to identify what we see as key considerations.

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<sup>1</sup> <http://ogpau.govspace.gov.au/>

<sup>2</sup> Executive Members; <http://www.accountabilityrt.org/about/>

What should guide this new partnership?

First, there are the objectives of the Open Government Partnership of which Australia is now an active member. The OGP Articles of Governance<sup>3</sup> state - ;

“The Open Government Partnership (OGP) is a voluntary, multi-stakeholder international initiative that aims to secure concrete commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. <sup>4</sup>In pursuit of these goals, OGP provides an international forum for dialogue and sharing ideas and experience among governments, civil society organizations, and the private sector, all of which contribute to a common pursuit of open government. OGP stakeholders include participating governments as well as civil society and private sector entities that support the principles and mission of OGP.”

Secondly, the OGP opens its Mission Statement as follows;

“OGP’s vision is that more governments become sustainably more transparent, more accountable, and more responsive to their own citizens, with the ultimate goal of improving the quality of governance, as well as the quality of services that citizens receive. This will require a shift in norms and culture to ensure genuine dialogue and collaboration between governments and civil society. - See more at: <http://www.opengovpartnership.org/about/mission-and-strategy#sthash.um8HnjJH.dpuf> ”

Thirdly, what we have embarked upon in Australia is a partnership to reform our Commonwealth Parliamentary Democracy. What is the nature and purpose of that Parliamentary Democracy? Can one do better than state – “Government of the people, by the people, for the people”?

And what principles should guide us participants in Australia’s Open Government Partnership in this reform process?

We submit that there is one fundamental principle that should guide all the participants in this partnership – those holding public office, those assisting them and we the people. The principle is the “public office public trust

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<http://www.opengovpartnership.org/sites/default/files/attachments/OGP%20ArticlesGov%20Apr%2021%202015.pdf> (p.1)

<sup>4</sup> emphasis added here and through the submission by italics

principle". This principle has been long forgotten by the community. It is not and has not been for many years in our consciousness or that of our elected representatives.

It is a simple ethical principle based on the proposition that where you entrust others with power over you and your affairs, they are obliged to exercise those powers for your benefit not theirs.

Translated to the operation of democratic governments, our public officers (elected and non-elected) are entrusted with power, and very substantial sums of our money, to make decisions of enormous significance for the present and future for we, the people, and our children and grandchildren. The public office public trust principle requires that when making decisions they must put the public interest first and in priority to their personal interests and other private interests.

It is equally applicable to the all active participants in Australia's OPG and should provide guidance when considering issues, evidence and solutions.

It is also a legal principle - part of our common law.

The legal position was recently described by Sir Gerard Brennan, the former Chief Justice of the High Court, in his speech<sup>5</sup> before presenting the ART Commonwealth Parliamentary Integrity Awards. He said (p3)

"It has long been an established legal principle that a member of Parliament holds "a fiduciary relation towards the public"<sup>6</sup> and "undertakes and has imposed upon him a public duty and a public trust".<sup>7</sup> The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.<sup>8</sup>

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<sup>5</sup> <http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/>

<sup>6</sup> (quoting Higgins, J. in *R v Boston* (1923)33 CLR386, 412)

<sup>7</sup> *ibid*408

<sup>8</sup> citing Rich,J in *Horne v Barber*(1920)27CLR494,501

Turning to the question of enforcement, he said (p5):

“True it is that the fiduciary duties of political officers are often impossible to enforce judicially<sup>9</sup>; the courts will not invalidate a law of the Parliament for failure to secure the public - interest<sup>10</sup> – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry “whatever it takes” is not consistent with the performance of fiduciary duty.”

This is not the occasion to explore the scope of the legal principle and its application in our legal system. Examples include the development of administrative law, the common law criminal offence of misconduct in public office<sup>11</sup>, sentencing law, and contract law. Where unfettered statutory discretions are given to ministers such as planning ministers, the common law requires that the minister comply with the principle.<sup>12</sup>

It may be said that every democratic government, including each of its three branches (the legislature, the executive and the judiciary) is in a unique and very special fiduciary relationship with all its citizens, who are its beneficiaries. They are mega public trusts and we, the people, the beneficiaries. One of the distinguishing features, however, is that where the trustees fail the beneficiaries in developing policy, we, the beneficiaries, generally cannot seek

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<sup>9</sup> citing *United Steamship Co of Australia Pty Ltd v King* (1988) 82 CLR 43 at 48

<sup>10</sup> In para 16 of the judgement it is stated:

“16. These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words “for the peace, order and good government” are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers* (1982) 1 NZLR 374, at p 390; *Fraser v. State Services Commission* (1984) 1 NZLR 116, at p 121; *Taylor v. New Zealand Poultry Board* (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in *Pickin v. British Railways Board* (1974) AC 765, at p 782, is another question which we need not explore.”

<sup>11</sup> Smith, T, **Integrity in politics? Public office as a public trust? Is there hope?** -[http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-3\\_.pdf](http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-3_.pdf) ; , and Lusty, D. **“Revival of the Common Law Offence of Misconduct in Public Office”** (2014) 38 *Criminal Law Journal* 337, <http://www.accountabilityrt.org/?s=Lusty>

<sup>12</sup> The House of Lords held that while the orders had been made to pay 31 million pounds under statutory provisions that applied, they would also have been made at common law because what was involved was a breach of a position of public trust -

a remedy in the courts to courts and, as a result, the buck stops with us. That is our ultimate responsibility in this our Mega Public Trust. Australia's Open Government Partnership provides a structure that will enable us, and our Public Trustees, to discharge our responsibilities.

We turn to our response to the Government's request for feedback on the Government's proposed Stage I of the National Action Plan development.-

### Stage I – National Action Plan development

The proposed plan for Stage I is as follows<sup>13</sup>:

*“Stage I – Preparation, Framework and History*

*17 November 2015 – 11 December 2015*

A very short preparatory stage to get your feedback on a vision, skeleton framework for the Australian NAP Draft and get feedback on the background/history of open government in Australia. We also encourage you to explore the [OGP website](#) including some of the [actions plans from other governments](#). This is Australia's first action plan. You can contribute to this stage by:

- Adding feedback on the vision and framework to the [Stage 1 Blog post](#) comments.
- Adding feedback to the draft [Background page](#) comments.
- Tweeting your thoughts to #ogpau.
- Please keep specific ideas, actions and contributions to stage 2 as we need to get the framework right first.”

In providing feedback as to the “vision and framework” and the “Background page”, what should be addressed first?

We submit that before a specific “vision” and “framework” can be established for our first National Action Plan we must have a clear and complete picture of where Australia stands in relation to the stated objects of the OGP, including its “grand challenges” the “commitments” it seeks.

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<sup>13</sup> <http://ogpau.govspace.gov.au/national-action-plan/> (Note above, the OGP Mission Statement vision)

## The Background Statement (see Appendix A)

No national background will be the same as another. As stated in the OGP Articles of governance (p.17)<sup>14</sup>

“OGP recognises that all countries start from different baselines. Countries are charged with selecting the grand challenges and related concrete commitments that most relate to their unique country contexts”

The Articles also state that

“governments should begin their OGP national action plans by sharing existing efforts relating to their chosen grand challenge (s) *including specific open government strategies and ongoing programs*<sup>15</sup>. Action plans should then set out governments’ **OGP commitments**<sup>16</sup>, which stretch government practice beyond its current baseline with respect to the relevant grand challenge. These commitments may build on existing efforts, identify new steps to complete ongoing reforms, or initiate action in an entirely new area. *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 OGP to openness, transparency, civic participation and accountability*<sup>17</sup>

We turn to the Government’s draft Background Statement. It is entitled “Australia’s Open Government Efforts to Date”. It comprises seven sections.

We note that it presents a generally positive statement of the past.

As is stated in the Government’s draft statement, there is much to be proud of in respect of the past history of our Australian democracies in the five grand challenge areas. It is noticeable, however, that with the exception of the National Commission of Audit (2014) and growth in the data.gov.au service and other areas of the new media (including Platforms for Data Release and Adoption of Creative Commons), all important matters, the bulk of the positive evidence referred to occurred in and prior to 2010.

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<sup>14</sup>

<http://www.opengovpartnership.org/sites/default/files/attachments/OGP%20ArticlesGov%20Apr%2021%202015.pdf>

<sup>15</sup> emphasis added

<sup>16</sup> emphasis added

<sup>17</sup> *ibid*

The picture painted is, however, incomplete. In the last 20-30 years, the quality of our democracies has significantly changed in ways that have adversely affected the 5 Grand Challenge areas.<sup>18</sup>

In addition, there are at least two important omissions from this positive statement that need to be included – the creation of the Parliamentary Budget Office (2012) and the major reform of the Whistle-blower Protection legislation (2013).

There are also at least two problem areas that we submit need to be included in the Background.

(i) Freedom of Information.

The draft describes in some detail developments in and between 2010 and 2014 starting with the establishment of the OAIC in 2010. The draft correctly states that over the following four years, with changes made, it became “easier to request information and seek review of FOI decisions”.

The description is incomplete, however, because it should also refer to the other key statutory roles it was given; notably hearing complaints about the handling of FOI applications (instead of the Ombudsman), monitoring the system, and providing guidelines, to agencies and providing independent advice to Government. Reference, however, is made to the OAIC’s past performance of its statutory role in changing the culture in government (references the Information Publication Scheme (IPS) that is intended to give direction to agencies “to take proactive steps to release standard government information in a consistent way reflecting the pro-disclosure goals of the FOI Act”) and its privacy role (in 2014, the “Australian Privacy Principles (APP) included in the Privacy Act 1988).

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<sup>18</sup> The issue is discussed in <http://www.accountabilityrt.org/australias-democratic-governments-a-proud-history-their-present-state-and-future/>

But, as pointed out by James Mackay (comment 2 December,) there is no mention of what has occurred since May 2014 as a result of the conduct of the Government in giving effect to its decision to abolish the OAIC. We note that he also mentions Dr Hawke's 2013 Report and proposal that there be a comprehensive review of the operation of the FOI legislation, something that is yet to occur. As James Mackay states, there was no recommendation in Dr Hawke's review that the OAIC be abolished. His report in fact was positive about the operation of the OAIC.

The Government's attempt to abolish the OAIC by legislation in 2014 failed in late 2014 because the Senate would not pass the requisite Bill. But it had in the 2014/15 Budget Appropriations, limited its resourcing of the OAIC to 31 December 2014. By then, the OAIC had, in any event, had to cease to discharge most of its statutory responsibilities. Since then it has not received the funding needed to enable it to resume those statutory responsibilities although they still exist. In addition it has one Acting Commissioner to discharge functions allocated by legislation to 3 Commissioners. The practical effect has been that the FOI system has returned to its previous failed state which the creation of the OAIC was intended to address – i.e. a de facto abolition of the OAIC.

ART has attempted to communicate with the Attorney-General and the Prime Minister throughout this process.<sup>19</sup> The most recent letter from the Attorney-General appears to be one written to the President of the ICJ - a letter dated on 9 September (but received sometime later).<sup>20</sup> It was signed by his Chief of Staff, Mr O'Sullivan. The letter appeared to give the impression that thought

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<sup>19</sup> See correspondence and articles- <http://www.accountabilityrt.org/?s=OAIC>

<sup>20</sup> <http://icjvictoria.com.au/wp-content/uploads/2015/10/A-G-reply.pdf>



was being given to resolving the situation. Subsequently, however, the Attorney-Gen at a Senate Committee hearing stated that the Government's position was unchanged and it intended to seek the abolition of the OAIC. As to the last letter, signed by Mr O'Sullivan, he said he was unable to comment because he was not familiar with it<sup>21</sup>.

The unfortunate reality is that the de facto abolition of the OAIC, and the stalemate, have seriously weakened the FOI system and have made it more difficult for people to access information held by government and seek review of refusal decisions. That system that is, and should be, one of the most important parts of our Commonwealth Government Integrity System.

There is also a serious Constitutional aspect to this matter; whether the actions of the Executive Government has breached the constitutional principles vital to our democratic system of government, the separation of powers and the rule of law<sup>22</sup>.

We submit that this is a matter that Australia's Open Government Partnership should meet to discuss and resolve as soon as is possible. Having committed to the OGP, we cannot allow the situation to continue. The solution must also accord with our Partnership's commitments as a member of the OGP.

As to solutions, ART's proposal is that

- the Bill to abolish the OAIC should be withdrawn at the first opportunity when Parliament resumes and
- funding should be restored as soon as possible to enable three full time Commissioners to be appointed and adequate staff engaged.

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<sup>21</sup> Legal and Constitutional Affairs Committee Hearing 20 October 2015, e.g. p 46

<sup>22</sup> See material at <http://www.accountabilityrt.org/?s=separation+of+powers> including correspondence from the ICJ to the A-G.

(We note that the budget saving said to flow from the abolition of the OAIC was \$2.5 million per annum)

We also propose that Australia's first National Action Plan include a review of the operation of the OAIC to commence at the start of 2017 and to cover the period from its creation in 2010 to the end of 2016. We suggest that time-frame because there is likely to be value in a consideration of the operation of the OAIC under the different circumstances that will have occurred between 2010 and 2017.

(ii) "Changes in culture".

We refer to the material under that heading, and the following conclusion;

"Open government practices and advances have a dramatic impact on the federal and state and territory public services. The Australian Public Service is learning to value the contribution which more transparent interactive and open government practices can offer".

This also appears to relate to the use of modern technology. On that assumption, we do not challenge the statement.

But to what extent has the culture as to access to information and transparency changed overall?

The history of the OAIC, on and since 2010, would suggest that there is still a strong anti-access culture in government? We should also bear in mind Public Service Commissioner Lloyd's recently publicly stated opinion that FOI is 'very pernicious.' The reality is that the Government culture is divided about Freedom of Information Systems. We suggest that this is partly a consequence of the absence of the public office public trust principle from the consciousness of the vast majority of Australians holding public office<sup>23</sup>.

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<sup>23</sup> <http://www.accountabilityrt.org/australias-democratic-governments-a-proud-history-their-present-state-and-future/>

Restoring it to our consciousness would mean that when requests are made for information, person handling the request would have to approach the task on the basis that

- the information is the peoples' information not the government's,
- the people of Australia, including the person making the application, have the prima facie right to access their information and
- the decision should be made on the basis that the public interest must prevail over any personal or private interests that the decision-maker may have or any other public officers or individuals may have.

In relation to the two Grand Challenges identified for action by the Government in Australia's NAP, there have been significant negative changes in the culture, and therefore the conduct, of our democratic government over the last 20 to 30 years. But this has in fact occurred in each of the five "Grand Challenge" areas. In particular, there has been a failure in public ethics, access to information, campaign finance reform and addressing corruption.

As to the latter, consider the advice given to public servants by the Commissioner of the Commonwealth Public Service about accepting gifts. We note that not only does it encourage the receipt of gifts, it also sees it as improving relations between, the government and its "stakeholders" – i.e. the stakeholders are not the people of Australia but the people making the gifts. We note also that there is research about the effectiveness of small gifts in securing advantages<sup>24</sup>. All the Grand Challenge areas need attention.

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<sup>24</sup> op. cit., text preceding end note 9; and "APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads", Section 4.12, Gifts and Benefits <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits> .

We submit that the absence from public ethics of an awareness and consciousness of public office public trust principle has been a significant factor in the deterioration of democratic government in all the areas of the five OGP's Grand Challenges.

These issues are discussed further in a paper drawing on speeches made by Michelle Grattan and the Hon. Lindsay Tanner, Barry Jones and Fred Chaney.<sup>25</sup>

We turn to the next issue – “The Vision”

### **The Vision for the proposed NAP – Government Proposals.**

We refer to the Government's paper, Consultation Stage I: Preparation, Framework and History. It refers to Australia's

“long and proud history of open government, as one of the most transparent, accountable and engaged democracies in the world”, comments that “there is always more that can be done”

and asks us to contribute our thoughts on

“what a future vision for open government could look like in Australia”.

It then gives two examples to consider –

- “Open government in the 21<sup>st</sup> century needs to translate to digital processes and reporting to improve transparency and accountability.
- Open government mean citizens playing a greater part in policy development.”

We suggest, with respect, that these are not so much visions as specific objectives. As to visions, in addition to the OGP overarching vision referred to above (p. 2), will the following assist?

- In light of Australia's history in major areas of openness and accountability of government<sup>26</sup>, it is in a position to, and should take a leadership role in the OGP.

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Re research: Malmemendier and Schmidt; <http://www.nber.org/papers/w18543> - reported the Age <http://www.theage.com.au/comment/the-smaller-the-gift-the-larger-the-fallout-20140418-zqvy7.html#ixzz2zzMeY07G>

<sup>25</sup> <http://www.accountabilityrt.org/australias-democratic-governments-a-proud-history-their-present-state-and-future/>

- We should also give our Commonwealth democratic system of government and the people of Australia the benefits<sup>27</sup> that will flow from an ambitious commitment to the Objectives of the OGP and its principles.

Consider the statement of the UK Prime Minister Mr Cameron: speaking at the Open Government Partnership Summit 2013:

“...the best way to ensure that an economy delivers long-term success, and that success is felt by all of its people, is to have it overseen by political institutions in which everyone can share. Where governments are the servants of the people, not the masters. Where close tabs are kept on the powerful and where the powerful are forced to act in the interests of the whole people, not a narrow clique. That is why the transparency agenda is so important.”

He went on to say –

“So I want to finish by saying this: none of what I’ve outlined today is easy for us politicians. 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.”

We submit that what will be critical in guiding the development of the first Australian National Action Plan by the Australian OGP will be the guidance given by the OGP statements of principle and objectives. It is these that should guide us in identifying the “grand challenges” and the “principles” to be addressed and applied. They also serve the public trust principle.

### **The Government’s proposed Grand Challenges and Principles**

**(a)** The grand challenges. The Government’s proposed grand challenges that should be pursued and are explained are set out in the National Action Plan Consultation document<sup>28</sup>.

It there states that the

“The OGP advises that a country’s NA P should consist of 5-15 recommendations, draw on at least one of the five grand challenges defined by the OGP, and address defined National action plan principles”

and that

“at this stage, it is envisioned that the first Australian Government’s NAP will focus on the two OGP grand challenges<sup>29</sup> of:

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<sup>26</sup> refer back to the material in the background document talking about those areas.

<sup>27</sup> pp 3 and 7 <https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>

<sup>28</sup> National Action Plan Consultation, p2 -3

- Improving Public Services - measures that address the full spectrum of citizen services including health, education, criminal justice, water, electricity, telecommunications, and any other relevant service areas by fostering public service improvement or private sector innovation; and
- More Effectively Managing Public resources – measures that address budgets, procurement, natural resources and foreign assistance. “

**(b) The Principles.** It also states that in determining the specific commitments in the NAP (5 – 15 required),

“ Each of the commitments made under an NAP must address at least one of the following principles laid out by the OGP, so please consider these when making your contributions.<sup>30</sup>

- **Transparency:** Publication of government-held information; proactive or reactive releases of information; Mechanisms to strengthen the right to and open access to information.
- **Accountability:** The rules, regulations and mechanisms in place that call upon government actors to justify their actions, act upon criticisms or requirements made of them, and accept responsibility for failure to perform with respect to laws or commitments. Ideally these should include the public.
- **Participation:** on government policies or programs to provide input or feedback and make contributions that lead to more responsive innovative and effective governance.
- **Technology and Innovation:** Providing citizens with open access to and capability with technology for greater innovation. To be relevant to OGP, these initiatives must advance government transparency, accountability and/or public participation.”

It does not, however, state which of the above principles it envisions Australia’s first NAP should address. This, is a key issue to be addressed.

### **Guidance in choosing the principles to be applied – Relevant material.**

There is relevant material to be considered in the Articles of Governance. They state; 31

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<sup>29</sup> the other grand challenges are:

“2. Increasing Public Integrity – measures that address corruption and public ethics, access to information, campaign finance reform, and media and civil society freedom.

4. Creating Safer Communities – measures that address public safety, the security sector, disaster and crisis response, and environmental threats;

5. Increasing Corporate Accountability – measures that address corporate responsibility on issues such as the environment, anti-corruption, consumer protection and community engagement.”

<sup>30</sup> see also item 2.2 on page 3 of the OGP National Action Plan Template and guidelines Template discussed below

<sup>31</sup> P18; we noted some differences between the two above statements of the four principles. The discussion that follows, concerns the Articles’ statement.

“While the nature of concrete commitments under any grand challenge area should be flexible and allow for each country’s unique circumstances, all OGP commitments should reflect four core open government principles:

- Transparency: government-held information (including on activities and decisions) is open, comprehensive, timely, freely available to the public, and meets basic open data standards (e.g. raw data, machine readability) where formats allow.
- Citizen participation: Governments seek to mobilise citizens to engage in public debate, provide input, and make contributions that lead to more responsive, innovative and effective governance.
- Public Accountability: Rules, regulations and mechanisms in place call upon government actors to justify their actions, act upon criticisms or requirements made of them, and accept responsibility for failure to perform with respect to laws or commitments.
- Technology and Innovation for Transparency and Accountability: Governments embrace the importance of providing citizens with open access to technology, the role of new technologies in driving innovation, and increasing the capacity of citizens to use technology.

Accepting the above Government and OGP statements of the four principles, it follows that the OGP’s requirement is that all OGP member nations

- must focus on one of the above principles, but
- should focus on the four core principles

in making their commitments.

Focussing on the four should not be an imposition - on the contrary. For example;

- How can the Australian Open Government Partnership successfully address the “Technology and Innovation” principle without also addressing the “Transparency”, “Participation”, and “Accountability” principles?
- The participants in the Australian Partnership must also address their public trust obligations and do so by focusing on the four principles because that will best serve the public interest.
- Further, to do otherwise, will put the Australian Open Government Partnership at risk of a negative review of Australia’s performance on its first NAP because of it will fail the key “ambitious” test and be seen to show a lack of commitment to addressing the OGP key principles.

We submit that this view is reinforced when one has regard also to the list of the Expectations of OGP Participating Governments also contained in the Open Government Partnership: Articles of Governance<sup>32</sup>:

- “1. Endorse the high-level Open Government Declaration;
2. Make concrete commitments, as part of a country action plan, that are ambitious and go beyond a country’s current practice;
3. Develop country action plans through a multistakeholder process, with the active engagement of citizens and civil society;
4. Commit to a self-assessment and independent reporting on the country’s progress; and
5. Contribute to the advancement of open government in other countries through sharing of best practices, expertise, technical assistance, technologies and resources, as appropriate. “

**Applying the OGP principles to the grand challenge selection.**

As noted above, the present suggestion is that our Australian NAP address two of the five grand challenges –

- Improving Public Services<sup>33</sup> and
- More Effectively Managing Public Resources<sup>34</sup>.

We have been unable to identify how Australia’s NAP could be successful in those areas without also addressing at least one or more aspects Grand Challenge 2 – “Increasing Public Integrity”. What it lists are:

“measures that address corruption and public ethics, access to information, campaign finance reform, and media and civil society freedom”

Adequately addressing at least corruption, public ethics, access to information and campaign finance reform will be critical for the success of the action proposed, whatever that may be, in the NAP to address each of the two suggested Grand Challenges.

We also bear in mind that in the “OGP National Action Plan Template and Guidelines” (page 3) it is said that

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<sup>32</sup> Template page 3

<sup>33</sup> “Improving Public Services – measures that address the full spectrum of citizen services including health, education, criminal justice, water, electricity, telecommunications, and any other relevant service areas by fostering public service improvement or private sector innovation” (source - Articles of Governance)

<sup>34</sup> “ More Effectively Managing Public Resources – Measures that address budgets, procurement, natural resources, and foreign assistance” (source – op cit)



“Successful OGP action plans focus on ambitious national open government priorities and are relevant to the values of transparency and accountability;”

A possible explanation for not including Grand Challenge 2 is that the Government has assumed that it will inevitably be involved, and addressed, and so does not have to be included in the list?

But if that is the case, why not include it? By not choosing Grand Challenge 2, we would deny Australia the benefit in the ultimate review of its performance of having expressly committed to address three of the grand challenges? If it is not identified as a grand challenge to be addressed, there is also the danger that it will assist anyone involved who might want to keep Grand Challenge 2’s topics out of the discussion or downplay their significance. We are assuming that that is not the Government’s present intent.

It should also be noted, that the OGP Template envisages that the proposed “Introduction to the NAP” will, among other things, seek to justify the selection of the proposed grand challenges as the ones to be addressed. Our Framework should do likewise. It is a simple matter to justify the addressing of the three mentioned above because effectively it will identify major areas of government activity plus a commitment to increasing the public integrity of government; for they obviously interlock. It will also facilitate the “vision” statement to be made about the Australian Open Government partnership and so the Government itself.

On the other hand, if Grand Challenge 2 is not included, what will be our justification in the Introduction?

We also need to remember that Australia, for all its problems, is in a position to lead internationally by example and it is in Australia’s international and domestic interests - economic, security, and political - to do so.<sup>35</sup>

### **Developing the Framework for the NAP**

The government has suggested a structure which includes the following sections – Introduction, Vision, NAP Development Process, Open Government Efforts to Date, Overview of Commitments and Conclusion.

The only comment we make about the structure at this stage is that, having regard to matters that we have raised and discussed in the submission,, some sections be

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<sup>35</sup> Cameron and Obama speeches

added and the order perhaps changed as follows – Introduction, NAP Development Process, Open Government Efforts to Date, Guiding principles, Vision, Grand Challenges selected, Overview of Commitments and Conclusion

For reasons already given, we submit there should be a special section which identifies and discusses the principles that have guided the process and the outcome. Done well, it can only assist the implementation of the proposals put forward in the NAP that are made.

**A final matter – the reality challenge.**

A challenge for the Australian Open Government Partnership is that it ensures that it adequately and accurately identifies the realities in determining what matters need to be addressed and the proposals to be put forward in the NA P.

We submit that there is one reality that the OGP's objectives and principles require of us Partners to bear in mind throughout the NAP exercise – that, at the Commonwealth level

- there is a high risk of corrupt conduct in government at the Commonwealth level, and
- .we have a very weak and flawed Government Integrity System, one of the worst in Australia.

Attached as Appendix B is a draft list of the System's current elements with notes as to their flaws and weaknesses and identification of best practice elsewhere in Australia.

In addition, it needs to be borne in mind that, for some years (and for the foreseeable future), many enterprises large and small have needed government approvals, concessions, tax concessions and other economic supports. For some years now, we have also been increasingly outsourcing government services, and the services to government, with the result that, many more people are now financially dependent on securing government contracts and negotiating contracts with government. As a result, the opportunity, and so the potential, for corrupt conduct in government has been greatly increased. Further there has been a significant growth over the last 20 to 30 years in the lobbying Industry and in the flow of political donations and at the same time a long standing significant lack of transparency in both those processes.

While on the positive side, whistle-blower protection has been significantly improved, our independent anticorruption body, ACLEI, remains extremely limited in the conduct it can investigate. As a result we remain highly dependent on internal department and agency systems to prevent corrupt conduct and deal with it when it happens. But we know from past experience that that does not work. In addition, the present policy in the public service in relation to gifts to members of the public service encourages the giving and receipt of gifts; as noted above, there is also research confirming the effectiveness of small gifts in securing benefits from public servants that would not in the ordinary course be obtained .36

**Conclusion.**

We trust these responses will assist.

They have been prepared under considerable time pressure. If there are any matters that require supporting material, further development or need clarification or correction we would greatly appreciate the opportunity to address them.

We look forward to participating in this very important task.

Hon Tim Smith QC

Chair Accountability Round Table

11.12.2015

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<sup>36</sup> See material fn 24

## Australia’s Open Government Efforts to Date

Please note: this content is currently in draft.....

### OPEN REPORTING, BUDGETS AND PARLIAMENTARY PROCESSES

Australia has a long history of public sector and parliamentary open reporting. All government entities are required to produce and publicly publish their annual reports, budgets, contracts and a variety of other reporting requirements for the purposes of oversight and transparency. The [recent independent Review of Whole-of-Government Internal Regulation](#) gives a good outline of public sector reporting in the Australian Government. From a Parliamentary perspective, Australia has also had a good track record, with a high level of transparency and reporting across all [Parliamentary Business](#) including federal budgets, bills and legislation, transcripts from all Parliamentary business, tabled documents, the work of Parliamentary Committees and much more.

### AUSTRALIA’S ORIGINAL DECLARATION OF OPEN GOVERNMENT

In 2009, the Gov 2.0 Taskforce was established to advise the Government on the structural barriers and enabling policies for greater information disclosure, digital innovation and online engagement. This included the division of responsibilities for, and overall coordination of, these issues within government. A [Declaration of Open Government](#) was launched in 2010 (Archived).

In response, the Government made the [Declaration of Open Government](#) and accepted in full the recommendations in the Ahead of the Game: Blueprint for Reform of Australian Government Administration report, both of which promoted greater participation in Australia’s democracy, policy and legislative reform, commitments to open government practices, and greater release of public sector information.

### FREEDOM OF INFORMATION & PRIVACY REFORMS

The Office of the Australian Information Commissioner (OAIC) was established in 2010 under the new Australian Information Commissioner Act 2010. Over the course of the next four years the Freedom of Information Act 1982 was updated making it easier to request information and seek review of FOI decisions. Parliament enacted reforms with the passage of the Freedom of Information Amendment (Reform) Act 2010 (Cth) and the Australian Information Commissioner Act 2010 (AIC Act).

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<sup>37</sup> <http://ogpau.govspace.gov.au/background/>

The Information Publication Scheme was (IPS) which implemented directing agencies to take proactive steps to release standard government information in a consistent way reflecting the pro-disclosure goals of the FOI Act.

In 2014 the Australian Privacy Principles (APP) were added to Schedule 1 of the Privacy Act 1988. The APPs regulate the handling of personal information by Australian government and some private sector organisations.

#### PLATFORMS FOR DATA RELEASE

[Data.gov.au](#) was established in 2010 to enable the centralisation and distribution of open data and access to government data APIs. The website was allocated resourcing to initiate whole of government direction and curation of data. In 2012, data.gov.au was allocated resources to strengthen its role as an essential element in Australia's open government strategy. The number of datasets available on the website has grown from 500 to over 7,000, and is now working in alignment with state and territory and local governments via the Cross Jurisdictional Open Data Working Group to improve open data offerings nationwide.

#### ADOPTION OF CREATIVE COMMONS

In order to accommodate greater access to government information and bring consistency in licensing arrangements, the public service adapted Creative Commons Attribution 3.0. The adaption of the license enabled all government content with the exception of Commonwealth Coat of Arms and unless specifically stated elsewhere. Details in the [AGD Statement of Intellectual Property Principles for Australian Government](#).

#### NATIONAL COMMISSION OF AUDIT

The [National Commission of Audit's](#) (2014) focus on improving the management of public resources has enabled progressive whole of government changes in a short time. The government has been proactive in addressing the recommendations within the 2014/15 budget and in immediate organisational changes to improve the efficiency and effectiveness of public resource management.

As part of the structural reforms following the Audit, we have seen amalgamations of key government functions including the creation of the Data Policy Branch within the Department of Communications. This branch is now positioned to provide overall data policy direction on whole of government initiatives including the development and implementation of the Australian Government Open Data policy.

The Audit also recommended further centralisation, sharing, and reuse of government resources with a focus on gaining from the opportunities innovation in technology can provide.

#### CHANGES IN CULTURE

Open government practices and advances have a dramatic impact on the federal and state and territory public services. The Australian Public Service is learning to value the contribution which more transparent, interactive, and open government practices can offer. It is benefiting from being a workforce which is looking for improvements based on our public needs – not just to solve problems when they arise, it is engaging with the public partnerships to actively encourage private enterprise to provide public services, and it is leveraging the skills and knowledge of the public to improve how it manages its services, manages its data, implements new processes. These changes in culture have been supported by a number of reports in recent years:

- [Open public sector information: from principles to practice \(OAIC\)](#). February 2013
- [Statement of Intellectual Property Principles for Australian Government \(AGD\)](#). October 2010
- [Government Response to the Gov 2.0 Taskforce Report \(Finance\)](#). May 2010
- [Ahead of the Game – Blueprint for the Reform of Australian Government Administration \(PM&C\)](#). March 2010 (ARCHIVED)

## Appendix B - the Commonwealth Government Integrity System <sup>38</sup>

Integrity system elements	Deficiencies/ options	Best practice
Commonwealth independent anti-corruption body	Extremely Limited jurisdiction; most recent ART submission <sup>39</sup>	NSW, Queensland
Political funding	Lack of transparency – threshold too high, disclosure not contemporaneous No caps on donations – easily avoided. Draw on recent Victorian Ombudsman Report and NSW review	NSW
Lobbying Disclosure	Restricted to third-party lobbyists; Code only; Easily avoided.	Recommendations; ICAC and Queensland Integrity Commissioner
Whistle-blower protection	Enacted in 2013, a significant improvement; next step a suitable review in 2017	Queensland, ACT
FOI system	OAIC de facto abolition; action – withdraw the Bill, resource the OAIC adequately for three years, review in 2017	Queensland
<u>Codes of conduct</u> – Ministers Ministerial staff Members of Parliament: M P's staff	Content satisfactory but should be enacted.    None	Commonwealth – Standards of Ministerial Ethics Cf. Queensland

<sup>38</sup> Draft: to be finalised.

<sup>39</sup> ACLEI website; Inquiry March-May 2014 submission 11

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Australian\\_Commission\\_for\\_Law\\_Enforcement\\_Integrity/Jurisdiction\\_of\\_ACLEI/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Jurisdiction_of_ACLEI/Submissions)

<p>Post retirement employment of the above</p> <p>Parliamentary Integrity Commissioner</p> <p><u>Generally</u></p>	<p>Not in place</p>	
<p>Auditor-General</p>	<p>Application of INTOSAI and other better practice principles in areas including independence of the Auditor-General, ability to share information with other integrity bodies, audit of performance statements, etc.</p>	<p>NZ, WA, Tasmania, Qld</p>
<p>The Parliament, strengthen and make more effective.</p> <p>Question time;</p> <p>Claims of public interest immunity to justify refusal to produce material to the Parliament;</p> <p>Budget settings for the Parliament</p>	<p>Rules/Independent presiding officers</p> <p>No system in place</p> <p>By the Treasurer. Should be by the Parliament</p>	<p>NSW</p>