



Law Council
OF AUSTRALIA

Australia's First Open Government National Action Plan 2016-18

Public Data Branch, Department of Prime Minister and Cabinet

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Acknowledgement

The Law Council acknowledges the assistance of its Business Law Section’s Foreign Corrupt Practices Working Group, Corporations Law Committee, its Federal Litigation and Dispute Resolution’s Administrative Law Committee, the National Criminal Law Committee and the Anti-Money Laundering Working Group in the preparation of this submission.

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors - one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Executive Summary

1. The Law Council welcomes the opportunity to provide comment on the draft of Australia's First Open Government National Action Plan 2016-18 (**draft NAP**).
2. The draft NAP sets out 14 Commitments and initial steps that the Government will take to achieve those Commitments with the aim of improving and building confidence in Australian institutions and democracy, and to uphold the principles in the Open Government Declaration.¹
3. The Law Council strongly supports the development of a NAP to increase transparency, openness, accountability and integrity in both the private and public sectors. Importantly, the NAP contemplates an ongoing program of consultation and engagement with civil society members. The Law Council encourages that process and looks forward to continued engagement particularly on issues of relevance to the Law Council, its Constituent Bodies, Sections and Advisory Committees.
4. The Law Council is encouraged by the commitment to advancing reform within the timeframes envisaged by the draft NAP. In recent years, reform has too frequently been stalled at the national level when implementation should have been possible. The Law Council trusts that the reform agenda is advanced within the proposed timeframes.
5. In general terms we support the scope and timetable of inquiries contained in the draft NAP. Given the limited timeframe for responses (14 business days) on the draft NAP, it has not been possible for the Law Council to provide a comprehensive response in relation to all of the proposed Commitments and milestones. The Law Council sought the views of its Constituent Bodies once the broad topics and specific Commitments of the draft NAP were identified; however, there has been insufficient time to allow for responses to detail.
6. Instead, the Law Council's submission focuses on the following key issues and recommendations:
 - There should be a review of corporate whistle-blowing laws including compensation generally, not just in relation to tax misconduct.
 - The proposed beneficial ownership consultation should ensure the availability of adequate, accurate and timely information on beneficial ownership and control of companies and other entities. The consultation should examine:
 - Existing disclosure mechanisms with a view to avoiding multiple regulatory regimes; and
 - The use of offshore vehicles by Australian citizens, particularly in tax havens.
 - The Office of the Australian Information Commissioner should be consulted in relation to any data sets proposed to be made public, particularly those that contain personal information.

¹ Open Government Declaration (September 2011), available at <http://www.opengovpartnership.org/about/open-government-declaration>

- A stand alone Freedom of Information Commissioner should be appointed without delay.
- The objectives in relation to Commitment 3.2 should include ensuring that the functions of educational and policy work and the monitoring of the *Freedom of Information Act 1982* (Cth) have a stable statutory and administrative basis and are adequately funded.
- The proposed review to be conducted by the Joint Standing Committee on Electoral Matters should consider issues relating to voting and political donations across all levels of Australian government and should not be limited to the 2016 Federal election.
- National-level corruption and anti-bribery enforcement issues should be contained in two separate Commitments.
- The establishment of a National Integrity Commission should be considered.
- The use of an expanded enforcement pyramid of sanctions to target corruption should be considered.
- Implementation of the recommendations from the Statutory Review of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) in as far as they apply to the legal profession must avoid adversely affecting the lawyer client relationship.
- Decisions of the multi-stakeholder partnership proposed under Commitment 5.1 should be made by consensus or, alternatively, by majority with civil society.
- Ministerial level decisions regarding the delivery of Australia's NPA should be based on the advice of the multi-stakeholder forum.
- The Australian Law Reform Commission's recommendations in relation to scrutiny mechanisms in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015] should be adopted as a milestone to enhance public participation in government decision-making.
- The draft NAP should be amended to make it clearer how it will support the achievement of the international Sustainable Development Goals in Australia and globally.

7. The Law Council also considers that the draft NAP can be further improved by ensuring that the:

- Introduction, efforts to date, Australia's leadership internationally and consultation and engagement activities clearly identifies the gaps where Australia needs to develop and the need to be part of the Open Government Partnership (OPG);
- Commitments and milestones are ambitious and concrete – Commitments to consider, explore options or similar do not meet the necessary ambition required in guidance from the OGP; and

- Milestones clearly articulate the actions to be taken to deliver on the Commitments.

Preliminary comments

8. The Introduction of the draft NAP refers to Australia's rankings in *Transparency International's Corruption Perceptions Index*, and *The Economist Intelligence Unit's Democracy Index*.² It is of concern that Australia's rankings in these annually conducted perception indices, have reached the lowest levels ever awarded to Australia and the implications this has for Australia's reputation and standing. The Introduction should be amended to clearly reflect why Australia's ranking in the *Transparency International's Corruption Perceptions Index* has fallen, and hence, why the development of the NAP is critical to improve Australia's standing.
9. Similarly, the 'Efforts to Date' section should be amended to provide a more accurately identify gaps in Australia's approach to date.
10. Ensuring meaningful civil society participation is included in all the Commitments is essential to fulfil the OPG process. All of the Commitments should therefore include a reference to civil society involvement and reference relevant non-government actors that should as a minimum be involved in achieving particular Commitments.

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

11. The Law Council welcomes Commitment 1.1 to improve protections for whistle-blowers in the private sector. The Commitment and milestones appear consistent with allowing an important opportunity for consultation. The Law Council is particularly interested in whistle-blower policy and looks forward to being a key non-government actor during the consultation process.
12. The Law Council notes that the pros and cons from a broader corporate culture and compliance perspective of alternative ways of protecting whistle-blowers are quite complex. In a previous submission in relation to the *Public Interest Disclosure Act 2013* (Cth), the Law Council specifically recommended that consideration be given to whether the Act's jurisdiction should be expanded to include the private sector in-and-of-itself. The Law Council also notes that the Senate Committee on Economics previously recommended that:
 - The definition of a whistle-blower in Part 9.4AAA of the Corporations Act be expanded to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners;
 - The scope of information protected by the whistle-blower protections be expanded to cover any misconduct that ASIC may investigate; and
 - ASIC not be required to produce a document revealing a whistle-blower's identity unless ordered by a court or tribunal, following certain criteria.³

² *Australia's First Open Government National Action Plan 2016-18; Draft for Consultation*, P3
<https://ogpau.govspace.gov.au/files/2016/10/Australias-first-Open-Government-National-Action-Plan-Draft-for-consultation-Accessible.pdf>

³ Senate Standing Committee on Economics, 'The Performance of the Australian Securities & Investments Commission: Report of the Senate Economics Committee Inquiry', June 2014, Recommendation 12.

13. However, the Law Council considers that there is a pressing need for review of corporate whistleblowing laws generally in the private sector, not just the narrower tax misconduct focus announced in the budget.⁴ If the proposed reforms are narrowed to tax misconduct, it is unlikely to encourage ethical commercial behaviour amongst Australian companies and generate artificial argument about what is or is not “tax misconduct”. Reforms need to encourage and protect private sector whistle-blowers to report any conduct that might be characterised as improper and/or illegal so that it can be properly and independently investigated and in circumstances where a whistle-blower knows that he or she will be properly protected if the company (or individual company officers) seeks to retaliate and thus, not “left out to dry”. The laws should be general, they should apply across the private sector and replace the existing piecemeal approach to regulation.
14. The inquiry should include consideration of compensation for whistle-blowers. There is extensive evidence from the activities of the United States Securities Exchange Commission Office of the Whistle-blower that proper, robust protection and compensation for whistle-blowers who disclose improper and/or illegal conduct leading to convictions are changing the way the business community reacts to and deals with allegations of such conduct.
15. The Law Council would support reform based on consideration and recognition of what areas are working well (in that regard we note the best practices adopted by many leading Australian corporations) and what areas should be encouraged through the structure of the legislation. In that regard, the Law Council commends the review program currently being undertaken through the *Whistling While They Work* research project. The review process would also benefit particularly from an analysis of the advantages and disadvantages reflected in the reforms adopted in recent years in the United States and Canada.
16. The Law Council would welcome a firm commitment of the target date for final legislation by December 2017. It is important for any reform to materially demonstrate that whistle-blowers are to be valued and properly protected, noting potential difficulties in relation to employment opportunities and reputational risks.

Recommendation:

- **There should be a review of corporate whistle-blowing laws including compensation generally, not just in relation to tax misconduct.**

⁴ See http://www.budget.gov.au/2016-17/content/glossies/tax_super/html/tax_super-01.htm

Commitment 1.2: Beneficial Ownership

17. As acknowledged in the draft NAP, Australia currently has beneficial ownership tracing powers in place. The Law Council agrees that consultation is appropriate in relation to any proposed reforms. The Law Council – through its Constituent Bodies, Business Law Section and relevant Advisory Committees – has considerable experience in beneficial ownership issues and would welcome the opportunity to be consulted on proposed reforms as a key non-government actor.
18. The proposed beneficial ownership consultation should include consideration of existing disclosure mechanisms and seek to avoid compliance duplication.
19. The use of offshore vehicles by Australian citizens (particularly in tax havens) should be considered as part of the review. Further, the Commitment should not be limited to ensuring the availability of adequate, accurate and timely information on beneficial ownership and control of companies.

Recommendations:

- **The proposed beneficial ownership consultation should ensure the availability of adequate, accurate and timely information on beneficial ownership and control of companies and other entities. The consultation should examine:**
 - **Existing disclosure mechanisms with a view to avoiding multiple regulatory regimes; and**
 - **The use of offshore vehicles by Australian citizens, particularly in tax havens.**

Commitment 1.3: Natural Resource Transparency

20. The Law Council notes that the Government has announced its intention to seek Extractive Industries Transparency Initiative (EITI) compliance.⁵ Commitment 1.3, the associated milestones and proposed timing appear consistent with the steps set out in the EITI.

Commitment 2.1: Release high-value datasets and enable data-driven innovation

21. The Law Council supports this Commitment in principle. However, if more data is to be made public, any personal data within these data sets must be adequately protected or anonymised to safeguard privacy. The Office of the Australian Information Commissioner (OAIC) should be consulted in relation to any data sets that contain personal information. The Law Council notes that the OAIC is a member of the Interim Working Group.

⁵ Media Release, The Hon Julie Bishop MP and the Hon Josh Frydenberg MP (6 May 2016) <http://www.industry.gov.au/resource/Programs/ExtractiveIndustriesTransparencyInitiative/Documents/Media-Release-Increasing-Transparency-in-Global-Resources-6May16.pdf>

Recommendation:

- **The Office of the Australian Information Commissioner should be consulted in relation to any data sets proposed to be made public, particularly those that contain personal information.**

Commitment 2.2: Build and maintain public trust to address concerns about data sharing

22. The Law Council supports more evidence-based policy development, particularly in the areas of criminal justice, sentencing, and funding for legal aid and the courts. In this respect, the Law Council welcomes the government's objective of providing more targeted and effective policy, service delivery and program evaluation; however, it is noted that this will require more than just actively engaging with the community regarding how public data is being used.

Commitment 2.3: Digitally transform the delivery of government services

23. The Law Council supports the proposed measures to ensure ease of access to government services.

Commitment 3.1: Information management and access laws for the 21st century

24. The Law Council agrees with broad proposal that the *Freedom of Information Act 1982* (Cth) (**FOI Act**) be reviewed to ensure that it is adapted to the digital era of government and that it is providing a coherent framework for managing and accessing government information.

25. The draft NAP approves a general recommendation made by the *Independent Review of Whole-of-Government Internal Regulation: Report to the Secretaries Committee on Transformation* (August 2015) (**Belcher Red Tape Review**)⁶ for a simpler and more coherent legislative framework for managing and accessing government information in a digital environment, through staged reforms. This approval may indicate a goal of implementing the limited number of recommendations made in the Belcher Red Tape Review specific to the topic of FOI. These were Belcher Recommendations 17.1, 17.2 and 17.3.

26. The Law Council does not disagree with Belcher Recommendation 17.1(i), that agencies subject to the FOI Act should examine their FOI practices to ensure that they impose the least burdensome mechanisms for responding to FOI requests.⁷ Further, the Law Council agrees with Belcher Recommendation 17.1(ii), that agencies should consider

⁶ Barbara Belcher, *Review of Whole-of-Government Internal Regulation: Report to the Secretaries Committee on Transformation*, (August 2015), available at <https://www.finance.gov.au/publications/reducingredtape/>

⁷ Barbara Belcher, *Review of Whole-of-Government Internal Regulation: Report to the Secretaries Committee on Transformation*, (August 2015), Vol 1, 38.

more active publication of information in order to decrease FOI requests.⁸ Both aspects of Belcher Recommendation 17.1 are concerned with efficiency and good administration rather than any proposal that the FOI Act be amended.

27. Belcher Recommendation 17.2 is that consideration be given to whether the Information Publication Scheme (IPS) could be consolidated with other government initiatives for enhancing public accessibility of government information, such as the digital transformation agenda.⁹ The IPS is shorthand for the requirements of ss 8 and 8A and of the FOI Act: that an agency publish details of its organisation; its functions; appointments to positions; arrangements by which the public may make comments on policy proposals; information as to documents to which the agency routinely gives access; contact details of FOI officers; and operational information. The IPS requirements are integral to the structure of FOI legislation. They are designed to enable members of the public to know more about the agency and the information it holds, so that they are in a position to make FOI requests or otherwise participate in agency decision-making. It would be inappropriate to relocate these requirements to another Act or to dilute them to the status of policy requirements.
28. Belcher Recommendation 17.3(i) is that reporting by agencies to the OAI should be done on an annual rather than a quarterly basis.¹⁰ This appears to be a reasonable proposal for change to current administrative practice.
29. Belcher Recommendation 17.3(ii) is to prioritise implementation of recommendations made by the *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (July 2013) (**Hawke Review**) to reduce the regulatory burden imposed on agencies by the operation of the FOI Act.¹¹ The recommendations specifically mentioned are Hawke Recommendations 21(a), 7, 8 and 9. Hawke Recommendation 21(a) is for the introduction of "administrative access schemes",¹² by which information of a kind that is regularly released is made available on request, without the need for any formal access application under the FOI Act. Described in those general terms the Law Council agrees that such arrangements are to be encouraged, provided that they do not entail any loss of rights of review in a case where the agency does not actually release the information sought.
30. Hawke Recommendations 7, 8 and 9 are that procedures for seeking an extension of the 30 day period for processing a request should be streamlined, including by removing the need to notify the OAI when the requester agrees to an extension; restrict the OAI's role in approving extensions; amend s 15AA of the FOI Act to enable extensions beyond an additional 30 days, with the agreement of the requester; calculation of "days" as working days rather than calendar days; and extensions of time by up to 30 days without the need for agreement in cases where the cabinet document exemption is claimed.¹³ While procedures for obtaining an extension of time should not be cumbersome, the Law Council does not support a proposal to facilitate extensions of the period of time allowed for processing FOI requests. The

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Allan Hawke AC, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (July 2013), available at <https://www.ag.gov.au/Consultations/Documents/FOI%20report.pdf> 7

¹³ Ibid., 5.

goal of achieving transparency may in many circumstances be largely defeated by lengthy processing periods.

31. Belcher Recommendation 17.3(iii) is that to enhance the operation of the FOI Act consideration should be given to issues raised about exemptions and the scope of access to information under the FOI Act.¹⁴ The only exemption specifically mentioned in the Belcher Red Tape Review is the exemption in s 47 with respect to documents disclosing trade secrets or commercially valuable information. Section 47 is said to be too narrow and implementation of Hawke Recommendation 19(a) is recommended. This is that s 47 should be expanded to cover any document that contains information about competitive commercial activities of agencies. The Law Council does not favour such an amendment and trusts that the general endorsement in the draft NAP of the Belcher Red Tape Review is not intended to signify a proposal to implement this Hawke Recommendation.
32. The Law Council notes that it has been specifically included as a non-government actor in relation to this Commitment. In light of the matters raised above, the Law Council looks forward to participating in the public consultation process regarding any proposed amendments to the FOI regime.

Commitment 3.2: Understand the use of Freedom of Information

33. The Law Council agrees with the proposal in Commitment 3.2 that the Commonwealth work with the States and Territories in order to develop, so far as possible, coordinated measures of the operation of FOI legislation in Australia. The Law Council also agrees with adoption of an objective of increasing public awareness regarding the right to access government information under FOI legislation.
34. The draft NAP states that the OAIC will be involved in implementing this Commitment. The Law Council welcomes the restoration of funding for the OAIC in the 2016 Federal Budget. The Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth), providing for the abolition of the OAIC and of the positions of two office-holders, the Australian Information Commissioner and the Freedom of Information Commissioner, lapsed in 2016. Although the *Australian Information Commissioner Act 2010* (Cth) remains unamended, still providing for the existence of the OAIC and three commissioners, one person currently holds the positions of Privacy Commissioner and Acting Australian Information Commissioner. The position of Freedom of Information Commissioner is vacant.
35. The Law Council recommends that there be added to Commitment 3.2 an objective of ensuring that the functions of educational and policy work, and monitoring of the FOI Act, are placed on a stable and sound statutory and administrative basis and are adequately funded.

¹⁴ Barbara Belcher, *Review of Whole-of-Government Internal Regulation: Report to the Secretaries Committee on Transformation, (August 2015), Vol 1, 38.*

Recommendations:

- **A stand alone Freedom of Information Commissioner should be appointed without delay; and**
- **The objectives should include ensuring that the functions of educational and policy work and the monitoring of the FOI Act have a stable statutory and administrative basis and are adequately funded.**

Commitment 3.3: Improve the discoverability and accessibility of government data and information

36. The Law Council agrees with the general objective of establishing platforms and tools to improve the accessibility of government information and public data. This should facilitate access by the public and also assist agencies in undertaking their search and response functions under the FOI Act.
37. The Law Council observes that publication of information about the availability of grants and the disclosure of the Department of the Environment's *State of the Environment* reports appear to be steps of a routine nature that should be taken, and do not merit special mention as means for achieving the overall objective. A more interactive digitised version of the latter report is an advance. However, this digitisation does not of itself increase the transparency of proposals that affect the environment. Decision-making affecting the environment will continue to be an area where requests under the FOI Act for access to specific documents will be actively pursued.

Commitment 4.1: Confidence in the electoral system and political parties

38. The Commitment is to 'investigate'. This could be improved by a Commitment to 'ensure that public confidence in Australia's electoral system is strengthened'. The Law Council considers that the review should extend beyond consideration of the 2016 Federal election and should extend to lessons learned from issues surrounding voting and political donations across all levels of Australian government in recent years.
39. In the Law Council's view, there needs to be consideration given to consistent Federal and State laws governing the electoral system, donations, the manner and structure by which donations are made and the transparency of the system that publicly records these matters. Where there is inconsistency, for example in State and Federal donation laws, it may reflect poorly on an electoral system where politicians and supporters of political parties (seeking to make a legitimate donation) adopt processes that appear to suggest they have something to hide. The key is transparency and consistency of approach which, in the Law Council's view, can only help to promote integrity and confidence in the Australian electoral system.

Recommendation:

- **Any review conducted by the Joint Standing Committee on Electoral Matters should consider issues relating to voting and political donations across all levels of Australian government and should not be limited to the 2016 Federal election.**

Commitment 4.2: National Integrity Framework

40. The Law Council supports the stated objective of the draft NAP's Commitment 4.2- to strengthen Australia's ability to prevent, detect and respond to bribery and corruption.
41. In this regard, as indicated, the draft NAP refers to Australia's rankings in *Transparency International's Corruption Perceptions Index*, and *The Economist Intelligence Unit's Democracy Index*.¹⁵ It is of concern that Australia's rankings in these annually conducted perception indices, have reached the lowest levels ever awarded to Australia and the implications this has for Australia's reputation and standing. Accordingly, the Law Council agrees with the stated ambition at Commitment 4.2 to aim to improve Australia's scores in these indices as a barometer of efforts to advance the ideals of public accountability and open access to information.
42. The Law Council considers that issues surrounding corruption at the national level and anti-bribery enforcement generally are properly two separate areas and should be covered by two separate Commitments. Enforcement remains a high priority and one which, despite recent improvements over the last few years, still appears remarkably low (for foreign bribery and corruption cases). There should be a strong stand-alone Commitment to enforcement action addressing domestic corruption.
43. In a previous submission to the Select Committee on the Establishment of a National Integrity Commission,¹⁶ the Law Council was of the view that a focussed national approach was needed in relation to corruption in Australia. The Law Council also suggested that a federal National Integrity Commission, with appropriate oversight and safeguards for affected individuals, be established. This position has not changed and the Law Council recommends that the creation of a single federal independent corruption body should be considered in the context of this Commitment. It is noted that the Select Committee in its Interim Report recommended that the Australian Government support current and future sound research into potential anti-corruption systems appropriate for Australia.¹⁷ The establishment of a Federal anti-corruption body has been raised over several years. A sensible dialogue should look at the existing Commonwealth myriad of structures and organisations, their strengths and weaknesses and whether the creation of a single national body will improve the integrity of federal institutions.

¹⁵ *Australia's First Open Government National Action Plan 2016-18; Draft for Consultation*, P3 <https://ogpau.govspace.gov.au/files/2016/10/Australias-first-Open-Government-National-Action-Plan-Draft-for-consultation-Accessible.pdf>

¹⁶ Law Council of Australia, *Submission to the Senate Select Committee on the Establishment of a National Integrity Commission* (20 April 2016), https://www.lawcouncil.asn.au/lawcouncil/images/3142_-_Establishment_of_a_National_Integrity_Commission.pdf

¹⁷ Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report* (3 May 2016), 39

44. The use of an expanded enforcement pyramid of sanctions targeting corruption should also be considered, including a clear transparent regime for the imposition of administrative sanctions (reflecting the prevailing regimes administered by the World Bank and other multi-lateral agencies). The Law Council supports the development of additional mechanisms in Australia to facilitate settlements, including by the adoption of a deferred prosecution agreement scheme for Commonwealth financial crimes (including foreign bribery and other serious financial offences).
45. A public consultation on the implementation of the recommendations of the Statutory Review of the Anti- Money Laundering and Counter- Terrorism Financing Act 2006 and Associated Rules and Regulations is proposed at Milestone 4- of Commitment 4.2.
46. It is a matter of record that the Law Council opposes the extension to legal practitioners of certain obligations to which *reporting entities* under the Anti- Money Laundering and Counter- Terrorism Financing laws (AML/CTF) are subject. Specifically, the Law Council opposes the introduction of an obligation on lawyers to make subjective reports in relation to their clients' affairs to law enforcement. This requirement is inconsistent with the ethical obligations and role of legal practitioners within the system of justice and would in the Law Council's view, seriously threaten the operation of client legal privilege, client confidentiality and the independence of the legal profession.
47. For these reasons and others, the Law Council will continue to oppose the implementation of aspects of the recommendations from the Statutory Review in so far as they apply to the legal profession. That said the Law Council is committed to endeavour to work with authorities to develop, as far as possible, mutually acceptable regulatory solutions to address actual rather than perceived, regulatory gaps.

Recommendations:

- **National-level corruption and anti-bribery enforcement issues should be contained in two separate Commitments;**
- **The establishment of a National Integrity Commission should be considered;**
- **The use of an expanded enforcement pyramid of sanctions to target corruption should be considered; and**
- **The recommendations from the Statutory Review of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) in as far as they relate to suspicious transaction reporting should not apply to the legal profession.**

Commitment 4.3: Open Contracting

48. The Law Council supports the proposed review of compliance with the Open Contracting Data Standard and the Commitment to implement any measures needed to improve compliance with the Standard after the review has been undertaken.

Commitment 5.1: Delivery of Australia's Open Government National Action Plan

49. The Law Council supports the establishment of a permanent multi-stakeholder forum and would welcome the opportunity to be a key member of the forum.
50. The Law Council notes that it will be critical to determine the decision-making process of the multi-stakeholder forum as part of achieving milestone 1 for Commitment 5.1. The Law Council's preliminary view is that the partnership should involve decision-making by consensus or, as a minimum, by majority with civil society. Ministerial level decisions should be based on the advice of the multi-stakeholder forum.

Recommendations:

- **Decisions of the multi-stakeholder partnership should be made by consensus or, alternatively, by majority with civil society; and**
- **Ministerial level decisions regarding the delivery of Australia's NPA should be based on the advice of the multi-stakeholder forum.**

Commitment 5.2: Enhance public participation in government decision making

51. The Law Council supports the objective of working towards improving public participation and engagement to enhance policy and service delivery outcomes for Australians.
52. However, in the Law Council's experience, public consultation periods and processes are often set by the Government of the day and particular political priorities. These may or may not be developed in conjunction with relevant Government agencies and stakeholders. While the draft NAP sets out commendable milestones they are largely limited to government agencies, the public and organisations outside of government.
53. To this end, the Law Council suggests that a key milestone under Commitment 5.2 should include improvements to parliamentary scrutiny mechanisms. This could include for example a milestone to implement recommendations made by the Australian Law Reform Commission (ALRC) in its *Final Report on Traditional Rights and Freedoms - Encroachments by Commonwealth Laws* [ALRC Report 129 - December 2015], in particular Chapter 3 - "Scrutiny Mechanisms". Those recommendations provide:

The mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by, for example:

- *providing additional guidance and assistance for policy makers during the policy development and legislative drafting;*
- *improving the quality of explanatory material and statements of compatibility;*

- *considering the level of overlap between the work of the three scrutiny Committees, including the range of rights covered by each Committee, and the differences in the scrutiny applied;*
- *increasing the time available for scrutiny committees to conduct its scrutiny; and*
- *improving the extent to which the Parliament considers scrutiny committee reports.*¹⁸

Recommendation:

- **The ALRC’s recommendations in relation to scrutiny mechanisms be adopted as a milestone in relation to this Commitment.**

Australia’s leadership internationally

54. The Law Council suggests that the draft NAP could be strengthened to make it clearer how it will support the achievement of the international Sustainable Development Goals in Australia and globally.

Recommendation:

- **The draft NAP should be amended to make it clearer how it will support the achievement of the international Sustainable Development Goals in Australia and globally.**

¹⁸ Australian Law Reform Commission *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* ALRC Report 129 (December 2015), 75-76.