



**Australian
Privacy
Foundation**

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Public Data Branch
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Supplementary Submission: Open Government National Action Plan

The Australian Privacy Foundation (APF) made a submission on 18 November concerning the draft Open Government National Action Plan.

In this brief supplementary submission we would like to make the following additional points:

1. Development of Open Data derived from personal data is a major reason for the need to enact a statutory tort for serious interferences with privacy. Such a statutory action has been recommended by the Australian Law Reform Commission, initially in its Report *For Your Information: Australian Privacy Law and Practice* [2008] ALRC 108, and most recently in its Report *Serious Invasions of Privacy in the Digital Era* [2014] ALRC 123. The NSW and Victorian law reform Commissions have also recommended such a statutory tort, as has a NSW Parliamentary Committee. The Foundation submits that such a law should be enacted.
2. Such a law should include in its scope both governments releasing such data, and those using the data. In the Foundation's submission, a duty of care in negligence is the appropriate test for liability. This would place the obligation on both the releasing party and the using party to take appropriate care, particularly in light of current knowledge of the risks of re-identification, and in light of the risks inherent in the particular category of data involved.
3. In addition, the Foundation submits that where Open Data derived from personal data becomes re-identified, following technical advances, no matter how long after release, this should be categorised as a data breach, and made reportable under the mandatory data breach reporting legislation which the Commonwealth government has undertaken to enact. Data breach reporting notification legislation also needs to be enacted by States and Territories.
4. Individuals affected by re-identification should be able to either (a) sue for a serious infringement of privacy (including by a class action), or (b) obtain statutory damages of (say) \$1,000 per head without need for proof of negligence (as done for data breaches in Korea).

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