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**NGO INVOLVEMENT IN THE EVALUATION AND
FOLLOW-UP MECHANISMS FOR DATA
PROTECTION CONVENTION 108+**

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(2019) Submission to the Consultative Committee of data protection
Convention 108 by the Australian Privacy Foundation (APF),
the Electronic Privacy Information Center (EPIC)
and Privacy International (PI)
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NGO involvement in the evaluation and follow-up mechanisms for data protection Convention 108+

(Submission to the Consultative Committee of data protection Convention 108 by the Australian Privacy Foundation (APF), the Electronic Privacy Information Center (EPIC) and Privacy International (PI))

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These comments and submissions concern 'Information Elements on the Evaluation and Follow-Up Mechanism' (T-PD(2018)21rev, 24 May 2019).^{*} These submissions follow the numbering and headings in this 'Elements' document, for easier reference.

The Australian Privacy Foundation (APF) <<https://privacy.org.au/>>, established in 1987, is Australia's principal organisation dedicated to the protection of privacy. The Electronic Privacy Information Centre (EPIC) <<https://epic.org/epic/about.html>> is a leading privacy and freedom of information organization in the United States, established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. UK-based Privacy International (PI) <<https://www.privacyinternational.org/>> defends and promotes the right to privacy across the world, and has done so since 1990. Both APF and Privacy International are Observers on the Consultative Committee of data protection Convention 108, and make these comments and submissions in that capacity. EPIC supports Convention 108, has participated in its conferences, and is considering applying for Observer status. References to 'the Commenters' in the following refer to APF, PI and EPIC jointly.

The Commenters give strong support to the comprehensive and valuable recommendations contained in the Elements document. They make a number of suggestions to increase the already substantial transparency requirements of the recommended Mechanisms, which are of particular importance to the public interested in data protection, who NGOs aim to represent.

As non-government organization (NGO) Observer of Convention 108/108+, because of their expertise in privacy issues, APF and EPIC have a particular interest in ensuring that NGOs have appropriate opportunities for input into the work of the new Convention Committee. A number of data protection authorities (DPAs) from countries which are not yet parties to Convention 108 are also Observers, including those from New Zealand, Korea, Mexico and the Philippines. The arguments put forward in this submission may be considered to also apply to these DPAs, and perhaps to other categories of Observers, but the Commenters will restrict their submissions to participation by privacy-specialist NGOs.

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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjSteKw0qzkAhWUF3IKHfxCDFYQFjAAegQIABAC&url=https%3A%2F%2Frm.coe.int%2Finformation-elements-on-the-evaluation-and-follow-up-mechanism%2F168094a5bd&usg=AOvVaw3AFb_6JKMSskUvn1_ef9T-

3.1. Composition of the Convention Committee and of its working group(s)

Privacy-specialist NGO Observers should be included in Working Groups. Observers will be part of the Convention Committee. The Elements document says that the members of the Working Groups will be drawn only from Parties to the Convention, but does not state any reasons why Observers cannot participate in the Working Groups. Working Groups will be chosen by the Committee, and only make recommendations, with Opinions being issued by the Committee. The Commenters are not aware of reasons why Observers from NGOs specialising in data protection could not participate in Working Groups. Therefore, Observers, like parties, should be able to propose one or more experts for inclusion in Working Groups.

The participation of observers, particularly NGOs, will help ensure that it is not only the perspective of State parties and State agencies that is brought to bear in the evaluation of the measures taken by an accession candidate or a Party, or their effectiveness. The perspectives of civil society may often be more critical than those of State bodies, and will always reflect different interests. The Commenters submit that, if they wish to do so, NGO Observers should be able to propose one or more experts for inclusion in Working Groups to the Secretariat, for consideration by the Committee. They also submit that, as a general practice, a Working Group should contain one NGO participant. NGOs should not participate in a Working Group when it is evaluating the country in which they are based, but may contribute submissions on the same basis as other members of the public.

4.1 Transparency

The Commenters support the Elements report recommendations concerning transparency, but submit that there should be added that all documents referred to in 4.1 should be communicated to all Parties and Observers on the Committee, together with (where appropriate) a date by which comments or submissions should be made.

5. Order and frequency of evaluations

“Substantial criteria” warranting evaluation should more clearly incorporate provision of significant information to the Committee concerning a Party’s non-compliance with the Convention. The Commenters submit that the third point in the list of substantial criteria should be amended by addition of the following: ‘, particularly incidents indicating significant non-compliance with Convention obligations. The Secretariat should establish an email address for receipt of information about significant non-compliance with the Convention, which information may be considered in decisions about the scheduling of reviews of Parties.’

6. Evaluation and follow-up methods

The Commenters submit that the following words should be inserted before the colon in the second paragraph: ‘including but not limited to’. After footnote 14, the following words should be inserted: ‘and submissions by any organisation or individual to the Working Group or the Committee. To facilitate the receipt of such submissions, there should be an online announcement of each occasion of evaluation or follow-up, including publication of the questionnaire and allowing for online submissions from members of the public at large (as distinct from invited stakeholders).’

6.1 Evaluation and follow-up questionnaire

The Commenters consider that transparency in relation to details of concrete cases of the application of a law, and the sanctions and remedies resulting in such cases, are one of best indicators of the extent to which a law is effective, as well as making it more effective as part of ‘responsive regulation.’ There should be inserted at the end of the paragraph dealing with case law the words ‘and the extent to which the publicly accessible details of that case law are

transparent in demonstrating the interpretation and application of the law, and the sanctions and remedial actions that have resulted from its application’.

Because sanctions and remedies do not necessarily arise from case law, the evaluation questionnaire needs to be more specific about collecting information as to “effective remedies available to the data subject.” Effective remedies are essential to securing the fundamental rights guaranteed by Convention 108+, and is indeed guaranteed by the Convention and other international human rights instruments. The Commenters submit there should be an additional paragraph in the list: *‘Effective remedies which can be shown to be available to individuals, whether or not arising from case law.’*

The questionnaire should also more explicitly address the application of Article 11 of the Convention concerning Parties’ ability to derogate from the Convention’s protections. For example, the evaluation must review whether exceptions for matters such as national security do comply with the requirement to be provided for by law, respect the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society. The Commenters submit there should be a new third paragraph in the list: *‘ – Any exceptions or restrictions to these laws, and how they satisfy the specific requirements of Article 11 of the Convention;’*

7. Evaluation and follow-up criteria

In order for the questionnaire in [6] to better align with [7], there needs to be included in the evaluation and follow-up criteria reference to the key political and institutional factors, democracy and the rule of law. This is because the absence or low quality of either will have a detrimental effect on what might be an otherwise superficially impressive data protection regime.

The Commenters submit that there should be inserted as the first bullet point *‘* The general political and institutional context of the country, with particular attention to democracy, democratic institutions and the rule of law, and any effect these matters have on data protection;’*.

8. The evaluation and follow-up procedure

In Step 1, the Commenters support the questionnaire being sent to civil society representatives in the country concerned, but submit that there should be added to Step 1: *‘and by any other individuals or organisations who volunteer to complete the questionnaire or submit comments. The Secretariat will advertise the commencement of an evaluation/follow-up, and the time limit and modalities for replies.’* As noted in [6] above, there should be an online consultation opportunity for members of the public at large.

In Step 3, the suggestions concerning the content of the pre-report is not sufficiently specific. A second point should be inserted: *‘ – a general description of how the effectiveness of these measures has been ensured in practice, including details of the levels of implementation, sanctions applied, and remedial measures obtained.’*

In Step 4, it is not clear that Observers will have a right to comment. The Commenters recommend a sentence should be added to Step 4: *‘If written procedure is used, Observers will be included in the written procedure, to the extent of having a right to comment.’*

11. Financing the evaluation and follow-up activities

For avoidance of doubt, a sentence should be added to the first paragraph of [11]: *‘These provisions apply equally to Parties and Observers.’*

Summary of submissions

The Commenters submit that:

1. If they wish to do so, NGO Observers should be able to propose one or more experts for inclusion in Working Groups to the Secretariat, for consideration by the Committee.
2. As a general practice, a Working Group should contain one NGO participant.
3. NGOs should not participate in a Working Group when it is evaluating the country in which they are based, but may contribute submissions on the same basis as other members of the public.
4. All documents referred to in [4.1] should be communicated to all Parties and Observers on the Committee, together with (where appropriate) a date by which comments or submissions should be made.
5. In [5], the third point in the list of substantial criteria should be amended by addition of the following: ‘, particularly incidents indicating significant non-compliance with Convention obligations. The Secretariat should establish an email address for receipt of information about significant non-compliance with the Convention, which information may be considered in decisions about the scheduling of reviews of Parties.’
6. In [6], the following words should be inserted before the colon in the second paragraph: ‘including but not limited to’. After footnote 14, the following words should be inserted: ‘and submissions by any organisation or individual to the Working Group or the Committee. To facilitate the receipt of such submissions, there should be an online announcement of each occasion of evaluation or follow-up, including publication of the questionnaire and allowing for online submissions from members of the public at large (as distinct from invited stakeholders).’
7. There should be inserted in [6.1] at the end of the paragraph dealing with case law the words ‘and the extent to which the publicly accessible details of that case law are transparent in demonstrating the interpretation and application of the law, and the sanctions and remedial actions that have resulted from its application’. The “availability of effective remedies” and “application of Article 11 exceptions” should also be included in the questionnaire.
8. There should be inserted in [6.1] an additional paragraph in the list: ‘*Effective remedies* which can be shown to be available to individuals, whether or not arising from case law.’
9. There should be inserted in [6.1] a new third paragraph in the list: ‘ – *Any exceptions or restrictions* to these laws, and how they satisfy the specific requirements of Article 11 of the Convention;’
10. There should be inserted as the first bullet point in [7] ‘* The general political and institutional context of the country, with particular attention to democracy, democratic institutions and the rule of law, and any effect these matters have on data protection;’.
11. In [8.1] there should be added to Step 1: ‘and by any other individuals or organisations who volunteer to complete the questionnaire or submit comments. The Secretariat will advertise the commencement of an evaluation/follow-up, and the time limit and modalities for replies.’
12. In [8.1] a second point should be inserted in Step 3: ‘ – a general description of how the effectiveness of these measures has been ensured in practice, including details of the levels of implementation, sanctions applied, and remedial measures obtained.’
13. In [8.1] a sentence should be added to Step 4: ‘If written procedure is used, Observers will be included in the written procedure, to the extent of having a right to comment.’
14. A sentence should be added to the first paragraph of [11]: ‘These provisions apply equally to Parties and Observers.’