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«Are comparisons possible? A Framework for assessing the performance of data protection supervisors»

The purpose of this paper is to reflect on a possible framework for measuring the performance of a regulator, including data protection and privacy commissioners in their roles as regulators. The risks of not defining measures of performance and not measuring performance against those benchmarks can be extreme, including radical overhaul or abolition of such bodies during times of controversy. The paper concludes with a suggestion that commissioners consider establishing some simple, comparative measures. Given the challenges of ensuring that the results of performance measurement are comparable, commissioners may wish to withhold publishing these results for a year or two, during which an approach to understanding and interpreting the results develops.

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I. Introduction

[Rz 1] In order to achieve their aims, governments must be able to make decisions and give effect to their decisions. Governments are held to account for their decisions and actions. In turn, governments hold to account their agencies and other agents.

[Rz 2] Like a number of other economies around the world,¹ there has been a very strong focus over the last three decades in Australia on reform to improve performance and accountability of governments and their instrumentalities. Almost all of this reform has focused on two sectors: policy formulation and decision making; and service delivery. Service delivery reform has included significantly increased reporting obligations and budget reform and specific reform packages as well as privatization, outsourcing and frameworks for government business enterprises and other service delivery bodies.

[Rz 3] With few exceptions, however, these reforms have paid little attention to the performance of a very important 'third sector' in the machinery of government, namely agencies that regulate the activity of others. Data protection and privacy commissioners fall into this category. Outside of academia, it would seem that not a lot of work has been done on how to measure whether or not a regulator has done a good job. Instead, the focus is often on the nature of the legal structures and the economic incentives they create as opposed to whether, within the bounds of the law and surrounding environment, the regulator itself has performed well or badly.

[Rz 4] One of the considerable risks that regulators face, including commissioners, is criticism of their performance in circumstances where public expectations of them are not clear and there are few measures or statistics to show that they are performing. To give but one example, the whole regulatory structure of the Australian financial services industry was completely overhauled in the late 1990s in light of perceptions of the need for better performance.²

[Rz 5] The less clear the expectations of the commissioner, the greater these risks become. In Australia, for example, the approach taken by the Office of the Privacy Commissioner to regulating privacy caused some controversy in the early years when new privacy law applying to the private sector was introduced. The Office has been simultaneously accused of being in the pocket of the 'big end of town' and failing to act sufficiently strongly against organizations that breach provisions of the Act.³

[Rz 6] The proposals set out in this paper are based on a framework first published for discussion in early 2004.⁴

II. Performance measurement for data protection commissioners and other regulators today

[Rz 7] Almost without exception, data protection and privacy commissioners publish annual reports that include some measures of performance. They often include financial performance such as funds allocated and how deployed; other resource measures such as staff on hand; and basic activity statistics such as inquiries received, complaints received and investigated; audits undertaken; other service measures and sometimes performance ratios such as complaints investigated per investigator.

[Rz 8] Increasingly over the last 30 years, public management reform has called for performance measures that go beyond activity statistics.⁵ The aim has been to see whether an agency's existence made any difference to the world around it and whether the difference was as intended and how efficiently it achieved it. Service delivery and regulatory design has been a principal focus of this work.

[Rz 9] Ayres and Braithwaite in 1992⁶ and Malcolm Sparrow in 2000⁷, have recognized the impact of the public management revolution on regulators, which seems to have asked more of regulators without almost any answers. Sparrow (page 20) puts it like this:

[Rz 10] «Regulators, too, feel overwhelmed. There are too many laws to be enforced, too many violators, and not nearly enough resources. As they struggle to keep up, regulators feel that legal and judicial systems, already stretched to capacity, drag their efforts down. The court systems are overloaded. Procuring criminal, civil, or even administrative sanctions is cumbersome and timeconsuming. Regulators feel not only overwhelmed but less and less appreciated. Complexity, conflicts, and ambiguities – making it impossible to comply with everything – have the effect of bringing the law into disrepute and dulling consciences. Decreasing respect for regulations means decreasing respect for regulators. For regulators, continuing in a traditional, enforcementcentered mode – given the constraints of shrinking budgets, declining public tolerance for the use of regulatory authority, and clogged judicial systems – is now simply infeasible.»

[Rz 11] These writers go on to make very important contributions to the strategies that regulators such as data protection and privacy commissioners might adopt, including best use of market forces and a risk based approach to problem solving. Their proposals have been controversial in some quarters, because they set out new strategies with which not everybody has agreed,⁸ but ignore their thinking at your peril. Unfortunately, though, Sparrow in particular remains frustratingly coy on actual performance measures while being acutely aware of the need for them.

[Rz 12] Closer to home is the work of Bennett and Raab in 2003, where they set out preliminary considerations for an evaluation framework to assess the performance of data protection and privacy commissioners.⁹ However, they also find it difficult to move beyond setting out the considerations in establishing an evaluation framework, and actually propose measures of performance followed by taking measurements against those measures.

[Rz 13] An outstanding individual effort at developing a performance management framework is the «Four Pillar Quality Model» as part of the Quality Management System of the Privacy Commissioner of the Canton of Zurich,

Switzerland. This system has been certified in accordance with the universally recognized ISO 9001:2000 standard and is based on the QM approach of the Canton of Zurich (which in turn incorporates the approach of the European Foundation for Quality Management (EFQM)). The four pillars in the model comprise Basics, Procedures, Performance and Effects.

III. The Environment in which a commissioner operates is very important

[Rz 14] No regulator, commissioner or otherwise, operates in a vacuum. Its ability to act and what those actions are will always be influenced by the environment in which it operates. It is not possible to measure the effectiveness of a regulator unless the range of environmental factors that can affect its operations is taken into account. The design of suitable measures of performance and certainly the interpretation of actual results must take account of these environmental factors.

[Rz 15] Important environmental factors include:

- The Law, for example:
 - The powers given to the regulator
 - The principles to be enforced, for example whether they detailed and prescriptive or high level principles that require interpretation
 - The independence of the regulator from direction by government or other influence.
- Financial and staff resources available and how resource levels are decided in budgetary and political arenas.
- Government and public expectations
 - No matter how tightly written the law or how well resourced, the regulator will always have some discretion to choose which cases to prosecute, how to argue issues that are currently topical etc.
- The Global environment, for example
 - Can significantly impact on priorities as well
 - The tragedy of 11 September 2001, more than anything else recently, has affected what is expected of governments and of the regulators including privacy commissioners.
 - Technological change (for example the impact of surveillance devices, location tracking, RFID as well as significant escalation of threats to online safety through fraud etc)
 - The dot.com boom then crash, the expanded influence of data aggregators and their poor performance in other countries.
- Market forces
 - Strong public demand for safer transactions online, for example, resulting in demand for protection devices could lead to less pressure on regulators for education and enforcement (or just the opposite).

[Rz 16] When assessing the performance of a commissioner, there will be very significant factors in the surrounding environment that must be taken into account. However, they are not an excuse for avoiding serious effort at assessing performance. Indeed, environmental factors emphasize the need for the best possible objective assessment of performance in order to withstand and manage the ravages of the environment.

IV. What are the indicia of a good regulator?

[Rz 17] As a consequence of the lack of sound performance measurement frameworks, it appears that regulators are often measured by the political expediencies of the times, for example, by the amount of unwelcome noise received from key stakeholders. This noise may or may not have anything to do with the effectiveness and efficiency of the regulator. As a further consequence, at the 25th International Conference of Data Protection and Privacy Commissioners, it was suggested that being a privacy commissioner is better done in the later stages of ones career.

[Rz 18] It would seem useful in this environment to have some agreed measures about whether a commissioner is ethical, effective and efficient as a buffer to these uncertain forces.

[Rz 19] In very broad terms, the absolute bottom line of these three aspects is the ethical. A commissioner who is not perceived to be ethical is unlikely to retain government or public support for very long. This aspect can be hard to measure on a regular basis, but some surrogates can be considered. For example, independence, fairness, transparency and accountability are all likely to contribute to a perception of ethical performance.

[Rz 20] However, a commissioner who is otherwise ethical but who achieves little will similarly be perceived as not performing. An ethical commissioner must also be effective, but it may be difficult to decide 'effective at what'. Law does not always spell this out well.

[Rz 21] At the broadest level, a commissioner will have economic and social impacts including respect for the legislation being administered. More than anything else, a data protection commissioner is established to have a significant social impact, namely protecting the privacy, or at least the personal information, of individuals. However, it is unlikely that in doing this the commissioner will have no economic impact at all. Indeed, some of the economic impact may be intentional, for example to limit the extremes of direct marketing which in turn may reduce the number of people working in that industry, or positive, for example increased participation in the health system because it is trusted with health information. Thus both social and economic measures of the impact of the commissioner are needed. Most of these measures will be measures of effectiveness.

[Rz 22] The last of the three is being efficient. To some degree at least, questions of efficiency come up when the commissioner is seen to be otherwise performing. This ranking of 'last' is an important point relentlessly pursued by Sparrow in *The Regulatory Craft*. While important, including because it is often quantitative and hence can gain significant media and legislator attention, he argues that it often has little bearing on whether the regulator is actually achieving the goals behind its establishment, for example some measure of the protection of privacy. Accountability for resource use will be a sound basis for starting to measure efficiencies, but it will be important to find performance ratios that are relevant to good performance and measure them.

V. A suggested Framework for assessing a Commissioner's performance

[Rz 23] This paper outlines a framework to fill out how a commissioner's performance might be tested for the extent to which it is ethical, effective and efficient.

[Rz 24] In outlining these measures, it should be noted that they should not be treated as a check list that each regulator must tick off to be given full marks. No regulator will be able to star on all of these, all of the time. Rather they can be seen as matters that regulators and those assessing their performance will need to balance against each other in a holistic way. For example, regulators might need to consider how to exercise independence, but in a way that will enable it to continue to engage with stakeholders in an effective way that still maintains integrity. In summary, it seems to be a matter of how well a regulator manages to keep the 'balls' (or measures) in the air (at varying heights) without dropping them all at once.

[Rz 25] Some of the proposed measures are objective, for example, speed of response, while some are subjective, for example, whether people consider their lives have improved. Regulators and those assessing their performance will therefore need to adopt a range of tools to evaluate their performance against the measures outlined below.

1. Measures of economic impact

- A positive impact on the economy (either allocative or distributive);
- If the economic impact is negative, is this an intended consequence and is outweighed by either positive indirect economic outcomes, or positive social outcomes;
- A process for assessing and evaluating economic impacts;
- Economic impacts are fairly distributed across the economic sectors;
- Economic efficiency costs, caused by organizations or individuals having to meet bureaucratic requirements are minimized;
- Decisions are practical, workable and able to be implemented by the constituency;
- How market forces are harnessed rather than opposed, either by finding explicit pricing models that provide

incentives to appropriate behavior, or by helping businesses and others see the business case behind complying with the regulation or even going beyond that.

2. Measures of social impact

- Regulator has a process for evaluating the social impacts of its activities;
- Regular measures of public confidence in the handling of personal information by the public and private sectors.
- Most people consider their lives have changed for the better;
- People are better able to exercise their rights in the relevant area;
- People are willing and able to protect their interests on their own behalf;
- People are more confident in the way they interact in the relevant area and less likely to be duped;
- If there are unintended negative social impacts, the extent to which these are outweighed by other benefits such as economic benefits;
- Social impacts are fairly distributed across the community;
- The activities of the regulator appropriately reflect public opinion;
- Media have an informed and balanced approach to the area being regulated;
- Those who are regulated have changed their behavior to comply with regulatory requirements;
- Those who are regulated see the benefits of changing their behavior and would continue to do so regardless of the regulatory oversight (in the sense that the regulation should 'contain the seeds of its own destruction').

3. Measures for accountability of resources

- Regulator has a strategic plan that prioritizes and focuses its activities;
- The plan and the rationale behind the plan is widely known;
- Regulator has adhered to this plan;
- Regulator can account for how it has allocated and spent its resources against its plan;
- Regulator has evaluated its plan;
- Regulator has met all the statutory obligations of financial management;
- Regulator has evidence that the resources are being used efficiently;
- Regulator has explored means of increasing the pool of resources available to it;
- Regulator has policies and procedures in place to ensure that the process for raising and using such additional resources is transparent, ethical and far above any implications that this source of funds could compromise its independence;
- Regulator has made sure that all interested parties, including the government, the media and the public are aware of the implications of budget allocations.

4. Measures for independence, fairness, transparency and accountability in policy decision making

- Recognized and publicly respected processes to enable public participation in policy development processes;
- Participation in such processes takes into account those groups less easy to reach in public consultation processes;
- Decisions made based on the full range of criteria that go towards determining the public interest;
- Decisions have broad acceptance among key stakeholders;
- Processes are in place for regulator to make its policy and other decisions widely known and easily available, if necessary for years on end.

5. Measures for independence, fairness and accountability in approach to law enforcement:

- A well publicized and understood policy on how it will go about implementing and enforcing the law;
- Regulator adheres to this policy;
- Regulator has evidence on the levels of non compliance;
- Regulator has evidence of the effect of the policy on understanding and learning in the wider community;
- Regulator does not change the policy unless it is planned and well thought out and then the reasons for the

change and the new policy are well publicized.

6. Measures for independence, fairness, transparency and accountability in complaints handling

- Regulator ensures that the community, and in particular complainants, can easily find out about the process it follows when handling complaints;
- Regulator has effective processes to ensure that it handles complaints in an impartial fashion;
- When operating as an alternative dispute resolution body adopts best practice standards in dispute resolution;
- Regulator administers complaint handling role in accordance with the administrative law framework and in particular complies with the rules of natural justice when handling complaints;
- Regulator has processes to deal with any power imbalances between the parties when investigating and conciliating complaints;
- Regulator is as open as possible about the outcomes of the complaints it handles and the reasoning behind the decisions it makes about resolving complaints;
- Regulator regularly benchmarks complaint outcomes, including compensation agreed between the parties or specified in a formal decision of the regulator, against those of similar complaints handlers;
- Regulator has mechanisms for monitoring its complaints case loads and processes for independence, fairness, efficiency, consistency with other equivalent complaints handlers, and for trends in complaints that might indicate privacy issues that might be addressed at a systemic level;
- Regulator selects staff with relevant skills and experience and provides training and support for its staff.

7. Measures of active engagement with policy debate:

- Regulator engages with the media and with government policy development as issues arise;
- Regulator has successfully influenced policy outcomes;
- Regulator views are regularly sought by key stakeholders and regulator is seen as expert in regulated area.

8. Measures of respect for the law:

- The law is held in respect by the community, for example as found by survey;
- Media sentiment does not imply disrespect;
- Audits, sample surveys and other evaluation techniques indicate general compliance with the law;
- The law is not falling into disrepute because it is being applied mindlessly, especially when there is regulator discretion in its application (avoiding 'the law is an ass' criticisms).

9. Measures of efficient and good service provision:

- Regulator has a Service Charter which covers various service level response measures;
- Regulator has ways of measuring effectiveness of service provision and customer satisfaction with this, including web site usage statistics, number of inquiries handled and speed of response, a suite of measures on complaints handling processes (number of complaints on hand, number resolved annually, age of oldest unresolved complaint, average time a complaint takes to handle, average staff hours taken to handle a complaint, etc);¹²
- Regulator complies with the Service Charter, including by publishing performance results regularly;
- Service is accessible to disadvantaged groups;
- Regulator reviews services on a regular basis and revises approach as a result.

VI. The process of measuring performance

[Rz 26] Sparrow, among others, emphasizes that collecting good performance information is not cheap. In other words, it will involve the diversion of resources away from activity that some will perceive as core business. There can also be other costs. For example, audits initiated on otherwise complying organizations for the purposes of understanding wider compliance levels beyond organizations subject to complaint not only consumes the resources

of the commissioner but also of the auditee (including direct staff costs and possibly even their 'image'). Such action may have to be defended publicly. It will therefore be important to be able to show that such an approach is part of a wider strategy intended to improve outcomes by a greater margin than the immediate 'losses' due to the measurement costs.

[Rz 27] The lowest cost measures will be those that can be taken as derivatives of performing agency functions, for example numbers of complaints handled, time taken to handle etc. At the next level of cost, attempts at comparing the results of the agency with similar data collected by others, either similar data protection agencies, other complaints handlers or other investigators etc, can be relatively cheap and shed useful light, as can be seen from the work of Blair Stewart.

[Rz 28] For the reasons indicated earlier, though, these measures may also be of only marginal use in indicating whether a commissioner is actually having any effect in terms of protecting privacy.

[Rz 29] The next level of effort comes from commissioning survey work, for example surveys of the wider citizenry, complainants, respondents, auditees etc. A number of the measures suggested in this paper will only be answered this way.

[Rz 30] A more fundamental process, but often more costly still, can be built around peer review. A notable example in this category is the Peer Review of Competition Policy, UK Department of Trade & Industry, published in May 2004.¹³ In this instance, a global peer review was undertaken, involved 215 expert commentators. It also required significant analytical power in order to weight responses appropriately. This might be a 'gold standard' approach to be used rarely, but should not be dismissed as never applicable.

VII. Where might data protection and privacy commissioners start?

[Rz 31] The framework proposed here is very ambitious yet, according to the leading thinkers, is essential to develop if commissioners are to be able to withstand the buffets of the political debate and the pressures of technological development. However, attempting anything overambitious may be as risky as not starting if it slows down starting on the journey. Hence I suggest it is worth starting a trial with some simple measures that can be compared between jurisdictions before proceeding further. Complementary to this approach, though, it will be important to persist over a number of years in order to refine comparisons and develop the more difficult performance measures.

[Rz 32] Given the start already made in the Asia Pacific region through the work of Blair Stewart, one option might be for commissioners to select some of the measures he has identified and agree that they will be drawn together in comparative tables for as many accredited commissioners as possible, for reporting to the closed session of commissioners in 2006. The following from his measures might start the ball rolling:

- Complaints Received In A Year,
- Complaints Received Per head of population,
- Complaints Closed Per Year, Respondent Type (ie public or private sector),
- Subject matter of complaints (according to broad privacy principle),
- How Long It Takes To Handle An Average Complaint

VIII. Conclusion

[Rz 33] Developments over the last couple of decades mean that commissioners inevitably face the need to justify their work in terms of the outcomes that they are achieving. The «3E» framework identified here sets out an ambitious but integrated framework that might eventually be put in place. In practice, it will be important to make a realistic start and develop towards a full outcome based performance measurement framework than to start too ambitiously. Beginning quietly with early results considered by commissioners in their closed session may be a safe, appropriate place to start. However, it will be important not to stop there and work over the medium term to a more fully developed outcome based framework.

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- ¹ *The Politics of Regulation: institutions and regulatory reforms for the age of governance*, Jacint Jordana and David Levi Faur (eds) 2004, Edward Elgar Publishing Ltd. ISBN 1 84376 464 4.
- ² The Financial System Inquiry, Final Report released in March 1997, available online at: <http://fsi.treasury.gov.au/content/FinalReport.asp>
- ³ This has been the case since the law was introduced and continues to this day. See for example «Privacy Guidelines for the Private Sector», Media Release by the former Attorney General, 24 August 2001, available online at: www.ag.gov.au/www/attorneygeneralHome.nsf/Web+Pages/05A191AF2966866FCA256B57000FDF0F; and the range of opinions contained in the Submissions to the recent Review of the private sector provisions of the Privacy Act, online at: www.privacy.gov.au/act/review/reviewsub.html
- ⁴ «'Light Touch' or 'Soft Touch'? Reflections of a Regulator Implementing a New Privacy Regime» Office of the Federal Privacy Commissioner, March 2004, online at: www.privacy.gov.au/news/speeches/sp2_04p.pdf
- ⁵ See for example the work of the OECD on Public Governance and Management, online at: www.oecd.org/topic/0,2686,en_2649_37405_1_1_1_1_37405,00.html
- ⁶ *Responsive Regulation: Transcending the Deregulation Debate*, Ian Ayres and John Braithwaite, 1992, Oxford University Press. ISBN: 0195070704
- ⁷ *The Regulatory Craft: controlling risks, solving problems, and managing compliance*, Malcolm Sparrow, 2000, The Brookings Institution, Washington DC. ISBN: 0815780656
- ⁸ As noted by Sparrow (page 311), the courts have not always smiled favourably on a risk management, problem solving approach compared with a more even-handed, across the board approach to regulation. Indeed, some data protection legislation (Australia's *Privacy Act 1988* included) insists that all complaints 'must' be investigated, limiting resource deployment in a more strategic way.
- ⁹ *The Governance of Privacy: Policy instruments in global perspective*, Colin Bennett and Charles Raab, 2003, Cornwall, U.K.: MPG Books Ltd., 2003.
- ¹⁰ *The Quality Management System of the Privacy Commissioner of the Canton of Zurich*, Switzerland, April 2004 and available online at www.datenschutz.ch/qms_dsb_engl_20040421-2.pdf
- ¹¹ «The Role of The Privacy Regulator in an Era of Transparency», Professor Allan Fels AO, presented to the 25th International Conference of Data Protection and Privacy Commissioners, September 2003, online at: www.privacyconference2003.org/speakers.asp#fels
- ¹² Blair Stewart, Assistant Privacy Commissioner of New Zealand, has commenced an admirable body of work on these aspects of commissioner performance in the Asia Pacific region (ie New Zealand, Korea, Hong Kong, Canada (Federal and Provincial), and Australia (Federal and State)). He will be presenting the paper at the Regional Commissioners' meeting of data protection authorities outside of Europe, held in conjunction with the 27th International Conference of Data Protection and Privacy Commissioners. The paper compares published data from around the region on measures of Complaints Received In A Year, Complaints Received Per head of population, Complaints Closed Per Year, Respondent Type (ie public or private sector), Subject matter of complaints (according to broad privacy principle), How Long It Takes To Handle An Average Complaint, Resources Expended In Resolving Complaints, The Number of Staff Deployed In Resolving Complaints, Complaints Closed per Staff Member.
- ¹³ Peer Review of Competition Policy, undertaken by KPMG for the UK Department of Trade & Industry, May 2004, online at: www.dti.gov.uk/ccp/topics2/pdf2/peercp04.pdf

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