



Catherine Williams
Deputy Commissioner, Integrity, Standards and Ethics
Public Service Commission
Wellington 6011

By email: ogpnz@publicservice.govt.nz

28 July 2021

Dear Ms Williams,

Commitments for Aotearoa New Zealand's 4th Open Government Action Plan

I am writing to provide the New Zealand Council for Civil Liberties' suggested commitments for inclusion in the country's next National Action Plan as a member of the Open Government Partnership.

NZCCL has some specific suggestions arising from our focus on civil liberties, and we think the OGP action plan methods can be useful for addressing these issues in a way that builds trust. We also have some suggestions for commitments that are about building or extending capacity and capabilities for government to operate in a more open manner in future. Some of these build on work done in previous action plans, others address issues not taken up in those plans, but which still need to be responded to.

1. Public confidence in oversight of intelligence activities

Outcome sought
Public and parliamentary confidence that intelligence activities by all government agencies are adequately scrutinised, through broadening the jurisdiction of the Inspector-General of Intelligence and Security.
Commitment activities
<ul style="list-style-type: none">▪ A panel is created with an even number of representatives from civil society and the government to inquire into how the jurisdiction of IGIS can best be extended in order to ensure intelligence activities of all government agencies and the armed services are subject to its oversight, and how this extended jurisdiction should work in practice.▪ The terms of reference for the panel are co-written by civil society and government.▪ The panel will be required to hear oral evidence in public unless a two-thirds majority of its membership agrees that the panel will not be able to perform its task adequately without hearing evidence in closed session.▪ The panel will produce and publish a report on the results of its inquiry, complete with draft legislative provisions for any amendments to the law necessary.

Why it's important

The IGIS website states: "The intelligence branches of the armed services are not subject to oversight by the Inspector-General. Nor are the intelligence units of the Police, Customs, the Ministry of Primary Industries and Immigration New Zealand, or the intelligence reporting and policy units of the Department of the Prime Minister and Cabinet."

NZCCL also notes that the IGIS jurisdiction also does not cover other public service departments that handle classified information. This creates serious problems for people wishing to make a protected disclosure about matters recorded in classified documents.

Both the scrutiny of other agencies' intelligence activities and safe processes for potential whistleblowers are necessary for retention of public confidence in the behaviours and safe and justified use of the powers of these agencies. In addition, the current Counter-Terrorism Legislation Bill lowers the threshold for terrorism offences, and as such means that all agencies involved in countering terrorism need to be subject to rigorous oversight.

2. Co-design of a specialist agency for receiving protected disclosures

Outcome sought

A fit-for-purpose agency designed to receive and investigate protected disclosures.

Commitment activities

Civil society, media, legal professionals working with the Public Service Commission and other agencies work together to advance development of proposals on whistleblower protection that has been allocated to the 'second tranche' of reform of the legislation on protected disclosures.

This work is published on a website as it proceeds, and an email address created for other people to contact those doing the work if they want to.

Why it's important

Work following the public consultation held in 2018 has resulted in a Bill to re-write the Protected Disclosures Act that does not address all aspects of the matters addressed in the consultation and submissions received. For potential whistleblowers to have confidence in the scheme, possible agency, and future developments, further development of the proposals should be co-designed with those who assist whistleblowers outside government. This would give effect to the Public Service Act principle of 'fostering a culture of open government.'

3. Strengthening capability and capacity of Parliamentary Select Committees

Outcome sought

Select committees have increased capacity and capability to conduct their own analysis of submissions made to them on Bills instead of relying on departmental reports on these submissions, and can also use this capability to undertake inquiries into other issues.

Commitment activities

- Civil society, members of parliament, the Office of the Clerk, and the Parliamentary Service should work together to review evidence from overseas legislatures on the research and investigation support provided to committees of legislators, both for the detailed scrutiny stage of legislation, and for inquiries into matters within the competence of the relevant committee.
- Based on this evidence review, they should develop proposals to ensure our legislature is strengthened in its own capabilities and capacity to (i) analyse written and oral submissions to select committees on legislation, and (ii) conduct inquiries through select committees into matters chosen by the members of select committees.

Why it's important

The function of select committees is to provide independent scrutiny of legislation introduced by the government (or by Private Members Bill), and to enquire into issues within their competence, so as to hold government accountable or to inform policy debates.

At present, when select committees scrutinise a Bill, the MPs are not supported by research and analysis produced by staff working for them. Instead, they are dependent on analysis of submissions on the Bill being conducted by the same government department that has developed the policy and legislation for the government. This not only creates a substantial conflict of interest for the government department, but undermines public confidence in the independence of the legislature's scrutiny of the executive. NZCCL itself has experienced government departments failing to report to MPs fairly on submissions it has made on Bills, and we know other civil society organisations have experienced the same.

Addressing this problem will strengthen the independence of the legislature vis-à-vis the executive, strengthen public participation in key processes within our democracy, and should lead to better legislation and higher quality scrutiny.

The work needs to be done in an open process involving those who make submissions on legislation, since if it is to achieve the desired outcome, all those who will benefit from it should take part. Public and civil society involvement is also key to the proposals achieving external support, which is likely to be a necessary component of the proposals being funded.

4. Acceding to the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Outcome sought

New Zealand safeguards and strengthens rights of access to information on the environment, to participate in decision making on environmental issues, and access to justice on environmental matters by acceding to the UN's Aarhus Convention.

Commitment activities

- A working group of civil society representatives, MPs and officials from the Public Service Commission, Ministry of the Environment, Department of Conservation,

Ministry of Justice, and Ministry for Foreign Affairs and Trade is created to undertake an open and participatory examination of the Aarhus Convention, and its implications for New Zealand civil society and government if the country were to accede to the Convention.

- The working group is supported by a government department, and its working papers are published on a website to enable others. A contact email address is set up and published so others can contact the working group.

Why it's important

New Zealand endorsed Principle 10 of the Rio Earth Summit Declaration in 1992, which spelled out that protecting the environment was not only a government responsibility but also a responsibility for civil society and the private sector. The principle also said that in order for civil society and the private sector to be able to play their part, they needed legal rights to information and access to justice (<https://www.unep.org/news-and-stories/story/unep-implementing-principle-10-rio-declaration>).

In spite of this endorsement, we have seen NZ government's suspend environmental institutions made up of democratically elected councillors, refuse access to information about environmental issues, fail to collect data on environmental issues, and fail to safeguard the public's right to participate in decisions that impact on the environment.

Every European Union Country, the UK, Norway, and a number of other countries in eastern Europe and central Asia have acceded to the Convention (<https://unece.org/environment-policy/public-participation/aarhus-convention/map-parties>). New Zealand should protect and strengthen people's rights to participate in environmental decision making since this is a key issue for all our futures. Without people's voices, rights to information, and access to justice on environmental issues being safeguarded, the legitimacy of government actions on climate change, biodiversity protection and many other issues may be questioned or undermined.

5. Strengthening the Official Information Act

Outcomes sought

- The Official Information Act (OIA) is strengthened so as to enhance people's ability to participate in the making and administration of laws and policies, and to hold ministers and officials to account (the Act's main purposes). This will include:
 - Applying the Act to more public sector organisations;
 - Making the section 6 withholding grounds subject to a public interest override test;
 - The eligibility test in sections 12, 21, 22 and 23 are removed, so that the rights can be exercised by all;
 - A provision is inserted into the OIA to require public consultation on any policy or draft proposal for legislation which would remove or hinder access to information under the OIA, or which would take an organisation partially or wholly outside the scope of the Act;

- Recommendations are made for categories of information that should be required to be published via regulations made under an amendment creating an enabling provision; and
- Recommendations for further strengthening the OIA, both legislatively and through practice improvements.

Commitment activities

- A working group of civil society representatives, MPs and officials from the Public Service Commission and Ministry of Justice is created to draft amendments to the OIA.
- The working group is supported by a government department, and its working papers are published on a website to enable others. A contact email address is set up and published so others can contact the working group.
- The scope of organisations to which the Official Information Act applies is broadened, so as to include the Parliamentary Service, the Office of the Clerk, the Parliamentary Counsel Office, the Ombudsman, the Controller and Auditor-General, the Independent Policy Conduct Authority, the Inspector-General of Intelligence and Security, the Intelligence and Security Committee, and the Judicial Conduct Commissioner. The working group will also consider drafting a principles-based provision which would automatically make organisations fitting its criteria subject to the OIA
- The working group will draft amendments to apply a public interest test to claims for withholding under section 6 of the OIA, such that the holders of the information must establish that the public interest in withholding outweighs that in disclosure.
- The working group will draft amendments to remove the eligibility test in sections 12, 21, 22 and 23.
- The working group will draft amendments to section 19 to require agencies to provide requesters with details of the public interest factors they have considered when making their decision on requests.
- The working group will draft a provision for insertion into the OIA which requires all public sector bodies to publish for consultation and pre-legislative scrutiny any policy or draft proposal for legislation which would remove or hinder access to information under the OIA, or which would take an organisation partially or wholly outside the scope of the Act.
- The working group will review government work to increase proactive publication of information and make recommendations for categories of information that should be required to be published, via regulations made under an amendment creating an enabling provision.
- The working group will consider further areas for strengthening the OIA, drawing on the recommendations of the two Law Commission reviews of the Act, the submissions made to the Ministry of Justice consultation in 2019, and any further information the working group decides to consider.
- The working group will also consider where non-statutory improvements to information management and request processing practices of government departments and agencies can be made, so as to lift quality and performance.

Why it's important

The Ministry of Justice ran a public consultation exercise in 2019 on whether a review of the OIA was necessary. Although the then Minister of Justice said in July 2020 that if the

government was re-elected he would 're-write' the OIA, his successor has decided not commence a review of the Act.

NZCCL still wants to see wholesale reform of the OIA, but if the government is unwilling to proceed with this, more selective amendments need to be made to the OIA in the meantime.

This work is needed because there are clear areas where the OIA needs strengthening in order to achieve both its stated purposes and to enable departments to deliver the open government principle in the Public Service Act.

This work needs to be undertaken in the spirit of the Public Service Act section 12 principle to foster a culture of open government. We suggest this can be achieved in part by a joint working group of civil society, the media, MPs and government officials.

6. Open contracting

Outcome sought

Members of the public and private companies interested in contracting with the government to provide goods or services will be able to have free and easy access to tenders, RFPs, RFIs, contracts, and contract award notices, for all government procurement of goods and services, in line with the Open Contracting Principles and Open Contracting Data Standard. This will ensure value for money in government deals, increase competition, reduce wasteful spending, and provide better goods and services to government departments and the public.

Commitment activities

- Creation of a working group with civil society, industry representatives from different sectors, such as IT, construction, services, supported by MBIE as the lead agency for government procurement policy.
- Adopting the Open Contracting Principles, and working through the implications for amendment of the Government Rules of Procurement, GETS, All of Government Panels, etc.
- Implementing the Open Contracting Data Standard for the full public procurement process, including the planning, tenders, awards, contracts, and implementation phases.
- Development of a public open source tool based on open contracting to monitor public procurement for integrity risks
- Development of a program to engage citizens in the monitoring of public contracting for integrity, efficiency, effectiveness, and fairness.
- Development of a feedback mechanism to ensure that citizen feedback is channelled into ameliorative intervention.

Why it's important

Open contracting is highly relevant to addressing open government and all of the main values of the OGP:

- Transparency and increasing availability of information about government activities: Public contracting is one of the most valuable datasets within government. This is where most of the money gets spent and goods and services are paid for.
- Supporting civic participation. Supporting civic participation in the procurement process is a fundamental element of open contracting and crucial to its success. Engaging with contractors, CSOs and citizens can provide governments with much needed feedback about the performance of contracts, as well as instilling confidence in potential bidders that irregularities will be addressed.
- Improving accountability and professional integrity in government. Probably the heaviest user of open contracting data will be the government itself. Having more and better-quality contracting data will improve governments' systems and save money.
- Open contracting will help deliver better goods and services to citizen, deter fraud and corruption in government spending, save governments time and money, and help create a fairer business environment, especially by the inclusion of smaller businesses. Through open data and advanced analytical tools, citizen will have a better opportunity at holding the government to account and engage in the contracting cycle.

7. Strengthening Open Data

Outcome sought
A higher quality, more open and strengthened programme of activities for opening up government data for scrutiny, re-use and enabling participation and accountability.
Commitment activities
<p>All government agencies:</p> <ol style="list-style-type: none"> 1. Govern data with a strategy which complies to the Government Chief Data Steward's Data Strategy. Larger agencies should aspire to more useful standards, like ISO/IEC 38505. Those strategies are published. 2. Adopt and publish a data quality strategy, e.g. ISO 8000-150 3. Adopt and publish an algorithm governance strategy which exceeds the Aotearoa Algorithm Charter. 4. Commission and publish annual audits by external auditors for compliance to the strategies above. 5. Maintain and publish an information asset register listing all of the systems of record. For each system this provides: <ol style="list-style-type: none"> a) The documents for the system, including but not limited to: <ol style="list-style-type: none"> (i) Ethics evaluations, if any (ii) Opt-in or data collection agreements (iii) Business case (iv) Architecture

- (v) Design, including records of decisions to alter the design and especially the reasons for those alterations
 - (vi) As built
 - (vii) Test strategy, test cases, and test results
 - (viii) User guides and training materials
 - (ix) Operations and/or support guides
- b) The data dictionary of the system, describing the structure and purpose of the data and the security and privacy classification of each data element
 - c) Population metadata, including counts records of each type, counts of nulls, age of oldest and newest records of each type.
 - d) Measurements of quality of the data, including the rules being assessed and the rationale for those rules.
 - e) Any reports on the health or success of the system.
 - f) The current status of the system, e.g. proposed, in service, or decommissioned
 - g) The process for the public to gain access the data.
6. Maintain and publish a register of Algorithms, including but not limited to:
- a) The entirety of the algorithm as required by s22(1) of the Official Information Act (1982)
 - b) An explanation of the algorithm prepared proactively for use in a court of law
 - c) The Algorithm Impact Assessment (AIA) report(s), and reports describing any adjustments as a result of the AIA's.
 - d) Ethics evaluations, if any
 - e) The designs, including design objectives.
 - f) The known limitations, including my not limited to confidence levels, known failure scenarios, and procedural limitations.
 - g) Documents detailing the actions taken to identify, document and mitigate against discriminatory or other rights-harming impacts.*
 - h) The process which provides meaningful opportunities for the public to review, audit, and assess the algorithm to identify and detect problems.**
 - i) The results of external audits of the algorithm
 - j) The history of litigation, if any.

* - Section 32, Toronto Declaration

https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf

** - AI Now Institute's Practical Framework For Public Agency Accountability

<https://ainowinstitute.org/aiareport2018.pdf>

Why it's important

After good initial progress on opening up government data, the programme has lost its way, particularly following the disbandment of the open data leadership team at Statistics

NZ. The activities described above will not only reinvigorate the programme, but build on the work done to develop the Algorithm Charter.

8. Review of confidentiality terms imposed on external experts who serve on expert advisory groups across government

Outcome sought

External experts who serve on technical or other advisory groups are not inappropriately constrained from speaking publicly about the work of the groups and their contributions to them.

Commitment activities

- A joint working party of civil society and government officials should be convened to undertake a stocktake and review of agreements and terms non-officials are asked to agree to when they serve on advisory committees created by public service agencies and government departments.
- The working group should develop principles upon which such agreements should be based in future, and draft a model agreement for use by agencies. These principles should reflect the principles in section 12 and the values in section 16 of the Public Service Act 2020.
- A report of the joint working party should be published, along with the model agreement. The minutes and papers of the working group should be published on a website as the work is being undertaken, and an email address created for others who want to contact the working group.

Why it's important

While section 22 of the Public Service Act acknowledges the rights and freedoms of public service employees under the NZ Bill of Rights Act, this does not extend to external experts who provide their knowledge and expertise, often for free or minimal payment, to government departments on a wide variety of subjects. Often these experts are made to sign confidentiality agreements as a condition of serving on such advisory panels.

The problem with this is that while it may contribute to achievement of the 'no surprises' goal of the public service it is not compatible with section 14 of the NZ Bill of Rights Act, and is often likely to be in excess of what would be a justified limitation on that section's guarantee of freedom of expression.

This not only deprives these experts of their rights, but also denies the public (and parliament) the opportunity to hear from these experts on how work being undertaken by government is progressing, whether departments are adequately considering the issues raised, and if good outcomes are likely to result from the work.

If the government is serious about 'fostering a culture of open government' it needs to conduct a systematic overhaul of the conditions imposed on external experts, so that the presumption is one of openness and freedom to communicate about the work, with exceptions being narrowly drawn, strictly justified in line with section 5 of the NZ Bill of Rights Act, and with public interest exceptions.

9. Public consultation on draft primary and secondary legislation

Outcome sought
The quality of primary and secondary legislation (regulations and orders) is improved through open public processes of consultation on drafts of these measures, prior to the legislation being introduced to Parliament for scrutiny by MPs.
Commitment activities
<ul style="list-style-type: none">▪ A joint working group of civil society organisations, officials from the Parliamentary Counsel Office, Crown Law, Office of the Clerk and Public Service Commission is created to develop principles, standards and practical procedural guidance to achieve the outcome above. These principles should reflect the principles in section 12 and the values in section 16 of the Public Service Act 2020, as well as the section 4 purposes of the OIA.▪ A report of the joint working group should be published, along with the model agreement. The minutes and papers of the working group should be published on a website as the work is being undertaken, and an email address created for others who want to contact the working group.
Why it's important
The Legislation Design Advisory Committee has warned in its Briefing to the Incoming Minister that the quality of legislation has suffered in recent years.

10. Access to Judges' and Tribunal Decisions

Outcome sought
Free access to judgments of New Zealand courts and tribunals, published by the government using a system co-designed with civil society and the legal profession to facilitate innovation as well as access to information.
Commitment activities
<ul style="list-style-type: none">▪ A joint working group of civil society organisations, technologists, officials from the Ministry of Justice, Parliamentary Counsel Office, Crown Law, and the judiciary is created to develop principles, standards and practical procedural guidance to achieve the outcome above, including costing the proposals.▪ A report of the joint working group should be published, along with the costing. The minutes and papers of the working group should be published on a website as the work is being undertaken, and an email address created for others who want to contact the working group.▪ The government commits itself to funding the implementation of the working group's report in the next budget.
Why it's important
Currently access to case law – which can be crucial for understanding what the law is, and what people's obligations are – is haphazard at best. In many cases, access is impossible without an expensive subscription to a private legal publisher's database. Worse still,

underfunding of the tribunal system means that written records are not produced of all cases heard by tribunals such as the Human Rights Review Tribunal.

Free public access to judgments is crucial to understanding what is taking place in our courts and tribunals, and how people are being treated in the justice system. Taking control over the system for publishing judgments will ensure that the system meets the needs of the New Zealand legal system, serves the fair and open administration of justice and should facilitate publication in forms that enable development of tools and services that benefit research, scrutiny and access to justice.

In a common law jurisdiction, access to case law is as important as access primary and secondary legislation, and we wouldn't dream of putting the digital versions of the law behind a paywall.

11. Creation and funding of a video platform to enable free public viewing of all select committees, Hansard reporting of all select committees, and improving the Parliamentary website

Outcome sought

Free public video live-streaming and recordings of select committees on a technology platform owned and managed by Parliament. Increased funding for Hansard transcripts of public select committee sessions. Significant improvements to the Parliamentary website to enable people to access recordings of the select committee sessions on Parliament's website. Parliament ceases using Facebook for live-streaming select committee sessions.

Commitment activities

- A joint working group of civil society organisations, technologists, officials from the Parliamentary Service, and Office of the Clerk, is created to research the technologies used by overseas counterparts to live-stream committee hearings, record them, and make the video accessible to the public as effectively as possible. Costing the proposals.
- A report of the joint working group should be published, along with the costing. The minutes and papers of the working group should be published on a website as the work is being undertaken, and an email address created for others who want to contact the working group.
- The government commits itself to funding the implementation of the working group's report in the next budget.

Why it's important

It is offensive that Parliament relies on Facebook for live-streaming video of select committee sessions. Facebook may be a tool used by many people, but it is a company with appalling privacy practices and deeply suspect conduct regarding encouraging extremism through its desire for greater user 'engagement'. It's also adept at tax avoidance, to put it politely.

People wanting to watch a select committee hearing on a Bill or inquiry should not be forced to access the video via Facebook.

Facebook also provides extremely poor functionality. Searching, indexing, cataloguing, and time-stamping parts of a recording to enable easy access to the sections where a particular witness gave evidence appears impossible. The recordings are not even embedded on web pages for the relevant select committee.

For an example of how well this can be done, even in a bi-lingual context, it is worth looking at this example page from the Welsh Assembly:

<https://record.assembly.wales/Committee/5542>

It is also interesting - and embarrassing - to see how much better the Welsh Assembly's website is for making information available to the public, from document packs for the relevant session, to full Hansard reporting of select committee sessions, often bilingual, and with links to time-stamped video recordings. Here is the page for session of its Finance Committee:

<https://business.senedd.wales/ieListDocuments.aspx?CId=440&MIId=5542&Ver=4>

A basic starting point for enabling active citizenship through public participation in the legislative process and select committee inquiries has to be substantial investment in improving access to information. By resourcing the Hansard reporting of all public select committee sessions and publishing this in a manner that enables re-purposing of the material by third-party tools, Parliament will facilitate greater public engagement. By taking ownership of the tools for publishing video of select committee sessions, Parliament can protect viewers from nefarious data harvesters such as Facebook, provide a much higher quality of service, and again facilitate better public engagement.

NZCCL looks forward to working with Te Kawa Mataaho / the Public Service Commission on development of the action plan and implementation of some, if not all, of these commitments.

Yours sincerely,

Thomas Beagle
Chair
New Zealand Council for Civil Liberties