

6 December 2021

Dear Minister Hipkins,

He rau ringa e oti ai
Many hands make light work

Open Government Partnership: Summer Reading from Civil Society

Introduction

1. Following our joint meeting with you on 28 October, we indicated that we would send you a briefing for reading over the summer on recommended priorities and issues to consider from our civil society organisations. This briefing makes recommendations around putting OGP principles and processes for action plan development into an Aotearoa New Zealand context. These are followed by an appendix with contributions on topics that relate to suggested commitments.
2. We reiterate that our recommendations noted below are specific to our civil society organisations and not necessarily representative of all civil society. However, we submit these recommendations using our knowledge and understanding of civil society needs, and consideration of the work already undertaken in the planning of National Action Plan 4 (NAP4).
3. We hope you will be able to consider our suggestions over the summer break and would be happy to discuss any points arising from them.

Recommendations

Recommendation 1: Principles for OGP work

A. Embedding Te Tiriti o Waitangi in OGP

Contributors: Network Waitangi Otāutahi and Hui E! Community Aotearoa

4. The OGP process, like all mahi within government, should be grounded in Te Tiriti o Waitangi. We have welcomed discussions with officials about this. There is much more to be done to ensure the OGP process recognises obligations and opportunities under Te Tiriti however, and this must be a priority going forward.
5. We believe that foundational to the OGP in Aotearoa New Zealand, is a commitment to, and demonstration of honouring Te Tiriti o Waitangi by practising true Tiriti-based relationships between Tangata Whenua and Tangata Tiriti. These would share power

equally, celebrate cultural difference, and collectively improve health and wellbeing for all without prejudice.

6. As a first step, we recommend the following wording from the Education and Training Act 2019 be adopted across all OGP documentation in Aotearoa.
7. The Act directly references “**honouring Te Tiriti o Waitangi**.” and the purpose of the Act includes establishing and regulating an education system that “**honours Te Tiriti o Waitangi and supports Māori-Crown relationships**.”
8. And in Section 9 Te Tiriti o Waitangi this Act lists the main provisions that **recognise and respect the Crown’s responsibility to give effect to Te Tiriti o Waitangi**.
9. These three bolded sections above, we believe, capture the language needed to replace all other references to the Treaty in the OGP so that other references are consistent with this approach and any alternative wording is removed e.g. references to the principles of the Treaty are replaced with reference to Te Tiriti o Waitangi.

Recommendations 2: Process for OGP plan development

A. Appreciating the limitations of our current engagement

Contributor: Hui E! Community Aotearoa

10. It's important to recognise that the civil society organisations that have been closely involved this year don't represent all civil society and that key voices are missing. For future NAPs, these voices need to be included from the beginning of each plan's co-creation process, and the responsibility is on both government and civil society to ensure this happens. We would like to see priority given to considering how the OGP process can be developed so it works to ensure different voices are included in a meaningful way.
11. In the short term there are opportunities to involve more people in the development of specific commitments in this plan, and we would welcome discussion with officials about this and how we can improve the range and depth of civil society participation.

B. Inclusive public participation, responsiveness and co-creation, including connections to the Public Service Act

Contributor: Environment and Conservation Organisations of Aotearoa New Zealand (ECO)

12. New Zealand has committed in several international agreements to provide the public with access to all levels of decision making that may affect the environment. In the Appendix we cite some of these and make specific NAP4 action proposals.
13. The Public Service Act 2020 includes a duty on Chief Executives of government departments to give effect to the Public Service Principles. One of the principles with an intrinsic connection to the government's OGP work is that of '*fostering a culture of open government*'.

14. In order to really capitalise on the investment of effort and resources into the OGP work, we recommend that OGP activities are used to increase public participation, improve responsiveness, and create opportunities for genuine co-creation with civil society throughout the formation of new government policies, plans and particular decisions.

C. Embedding better public engagement in OGP design

Contributor: Transparency International New Zealand

15. Civil society organisational engagement in the development of National Action Plan 4 (NAP4) has been founded on the concept of “collaboration” as set in the OGP Spectrum of Participation which has been adapted by the OGP from the International Association for Public Participation (IAP2).
16. The adapted Spectrum describes six different levels of public influence: no consultation, inform, consult, involve, collaborate and empower.

ANNEX 1

Level of public influence	
Empower	The government handed decision-making power to members of the public.
Collaborate	There was iterative dialogue AND the public helped set the agenda.
Involve	The government gave feedback on how public input was considered.
Consult	The public could give inputs.
Inform	The government provided the public with information on the action plan.
No Consultation	No consultation

17. We believe we have moved from Consult (the public could give inputs) and Involve (the government gave feedback on how public input was considered) in previous rounds of NAP development, to Collaborate (there was iterative dialogue and the public helped set the agenda) in this stage of the NAP4 development. We congratulate you and Te Kawa Mataaho for responding positively to the concerns of civil society organisations to enable the shifting upwards of engagement.
18. The challenge remains for public service agencies to maintain and enhance public engagement during the design and implementation of commitments. The gap in capacity/willingness to do this has been identified by the OGP’s Independent Review Mechanism researcher in her past reports, as well as the 2021 Survey by The Project Project in DPMC. It also remains a concern of civil society groups. There is plenty of

theory and some examples of good engagement. But we need political and public service leaders to prioritise the embedding of will and skill around public participation.

19. It also means that the wording of the NAP4 commitments and the introduction are important because they talk to the ‘how’. Collaboration and empowerment should be used in NAP4 as an example of a bold approach. This will give effect to 12(1)(d) principle of *fostering a culture of open government*’ in the Public Service Act. For example, we suggest that if the review of the OIA process is selected as a commitment, that this review be either decided upon by the public (empowered) or be at the collaboration level, jointly led by civil society and government.

Recommendation: Budget

20. It is clear from other countries’ experience with their action plans over the last decade that the most successful ones have been where the government has committed sufficient resources to the work on each of the commitments.
21. Governments always face difficult choices around budgets, and we fully appreciate that the fiscal situation at this stage of the pandemic is especially challenging. However, one of the problems we seem to have faced here is that spending on OGP commitments has been taken from existing department baselines, rather than being adequately funded as new pieces of work. As noted above, this next action plan represents a key opportunity to use the OGP to help ‘mainstream’ open government practices in the Public Service by making the connection to implementation of the Public Service Act principles. Success on this front will be an enduring legacy of the government. As well as a set of discrete activities under the action plan, this means the work is also part of a wider culture change programme for the Public Service.
22. In order to secure the benefits of this effort - and huge efforts have been made by officials and civil society participants - the government will need to contribute the resources necessary to get the desired return on investment.

Conclusion

23. You will find specific suggestions for NAP4 commitments or issues to reflect upon from individual organisations in the Appendix to this briefing.
24. We will look to extend our organisational reach in 2022 to ensure wider participation from civil society organisations occurs in this important ongoing OGP kōrero.
25. Thank you again for engagement this year and your commitment to see the OGP work towards better engagement and being used as a more effective tool for open government. We wish you well for a well-earned break and look forward to connecting again in the new year.

Ngā mihi nui,

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Jordan Carter, **InternetNZ**

Julie Haggie, **Transparency International New Zealand**

Katherine Peet, **Network Waitangi Ōtautahi**

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APPENDIX: Potential NAP4 commitments

A. Data Integrity

Contributor: Transparency International New Zealand

1. The Public Service gathers, creates and manages more data than any other organisation in Aotearoa. As the Economist noted in 2017, “The world’s most valuable resource is no longer oil, but data”. It is important that this most valuable asset is well-managed – for reasons of efficiency, effectiveness, decision making and public trust. Open Government can be a valuable lever to improve the integrity of data managed by the Public Service.
2. Data integrity is the overall accuracy, completeness, and consistency of data, including the confidentiality, privacy and security of data. The pandemic response showed the value of data integrity in building and maintaining trust in government: the daily release of the detailed information on the cases (initially) and vaccinations (more recently) generated public confidence that government was managing the response effectively. It was an example of open government data demonstrating the quality of decision making and building public trust.
3. National Action Plan 3 included a commitment (#11) to publish an authoritative dataset of government organisations as open machine-readable data. While TKM published a dataset of some organisations, this does not include all government organisations, and is not in a form that would enable organisations across the Public Service to cease using duplicate information they’ve developed themselves. The accuracy, efficiency, and effectiveness benefits have not yet been realised and we are pleased to see from the government’s Self-Assessment report that work on this project will continue.
4. National Action Plan 3 also included a commitment (#12) to publish data on contracts awarded by government agencies as open data from the Government Electronic Tenders Service (GETS), and more than 6,400 contract award notices have been published since 1 July 2019. Analysis of these notices reveals poor data quality and low coverage (less than 3% of government expenditure), and it is clear that there are significant opportunities to improve the integrity of procurement data. We hope NAP4 will go further and include a commitment to sign up to the Open Contracting Partnership’s principles and data standard for all public sector procurement.
5. These two examples indicate the work that needs to be done to better manage our most valuable asset – data. They also show how Open Government can highlight areas for management attention, providing insights for political leaders and senior officials to use in developing a better Public Service.

B. Environment and Public Participation, Access to Justice and to Information

Contributor: Environment and Conservation Organisations of Aotearoa New Zealand (ECO)

6. ECO welcomes the opportunity to suggest specific actions for inclusion in NAP4, and to strengthen open and participatory government in New Zealand.
7. New Zealand has made commitments already in some legislation and in international agreements, and the OGP process gives us the opportunity to strengthen these.
8. As well as the implementation of the Official Information Act in 1982, in 1992 as part of the Rio Declaration, New Zealand agreed to Principle 10 and the Bali Guideline. This affirms public rights of participation, information and “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
9. It states that:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

10. New Zealand also signed up to the 2015 SDG Goal 16 and Target 16.7: “Ensure responsive, inclusive, participatory and representative decision-making at all levels.”
11. The implementation of the Official Information Act in 1982 took us from secrecy to the presumption of openness for much information. The Resource Management Act 1991 provided for open standing in proceedings under it - partly for democratic reasons, partly to avoid endless wrangles over standing.
12. ECO was impressed by the actions that have already been taken by Parliament to open up via video conference and other mechanisms, we would like to see more progress on that and other fronts.
13. Here are some of the links to relevant international commitments:

UNEP - Rio Declaration Principle 10:

<https://www.unep.org/civil-society-engagement/partnerships/principle-10>

SDG 16.7 'Targets and Indicators' under the first few links to articles on this page:

<https://sdgs.un.org/goals/goal16>.

C. Public participation in environmental policies, plans and decision making about activities with site-specific impacts

Contributor: Environment and Conservation Organisations of Aotearoa New Zealand (ECO)

14. Here we recommend actions that require more timely access to official information, public access to, and input into, all stages of government decision making: design of terms of reference, policy development, evaluation criteria, public consultation and decision making. We consider these to be vital steps to effective public participation but so too is provision for broadened access to environmental justice.

- a. **Problem 1:** Despite the government having made commitments to open government and that it has adopted a range of agreements about open government and public participation - including the OGP, SDG 16.7, UNEP and other instruments, the Government is in several areas, designing laws and other processes for public decisions that are restricting public access to public decision making. This is so especially at the local level, but also includes denying rights of appeal and designating a single group or person to represent others. All this results in loss of democratic legitimacy, poor and ill-informed decision making, loss of “the consent of the governed” and future conflict via occupations of land and development sites.

Examples are the Resource Management System reform and the 2020 and 2021 infrastructure, housing, and fast-tracked consent laws. These limit or deny participatory rights, limit or deny rights of appeals, concentrate decision making in central government or private developers. Too often they permit participation only through proxies such as government appointed NGOs or just one representative of the many environmental concerns. This is leading to the public and many environmental groups not having any opportunity to participate.

- b. **Solution 1:** NAP4 should contain a commitment reaffirming the international agreement text and should roll back restrictive provisions, in order to allow open public participation relating to the environment at all levels.
- c. **Problem 2:** Co-creation of environmental legislation or agreements can be significantly restricted where only one industry body does a deal with the government, but others are excluded. We are seeing the government co-creating with one or more of: local government, business, iwi/hapu but not providing for public input.
- d. **Solution 2:** Co-creation on matters having environmental consequences with environmental groups, experts and the public must be a requirement for the development of all MoU's and other co-creation products between government and business, iwi, or other sectors, to provide opportunity for genuine environmental and public input.
- e. **Problem 3:** As the youth and other contributions of ideas in the OGP consultation process shows, there is a strong demand for clear and

centralised guides, “road maps” and “navigators” to help people find out which agency does what, how to participate, who to contact, and “navigator services” in the form of particular people who can help those unfamiliar with government agencies and responsibilities to find their way around to have input.

- f. **Solution 3:** Provide these guides, route “finders”, people and sources of advice to those who need to find their way.

D. Adoption of participatory rights, access to justice and other elements of the Aarhus Convention

Contributor: Environment and Conservation Organisations of Aotearoa New Zealand (ECO)

15. Important NAP4 commitments should include much improved access to environmental justice. This features in several international commitments New Zealand has already made. There is useful language with particular provisions in the UN’s Aarhus Convention of 1998 which New Zealand could adopt, and we could also consider whether to accede to the Aarhus Convention itself:

- a. **Problem 4:** Access to environmental justice in New Zealand is usually limited to the wealthy or to Environmental Legal Aid for Resource Management Act cases. Such legal aid is not available for judicial reviews or actions under any of the other laws that allow potentially huge impacts on the environment, such as the EEZ & Continental Shelf Act (eg. seabed mining cases), the Fisheries, Wildlife and HASNO Acts and many others.
- b. **Solution 4:** Extend Environmental legal aid to all cases where impacts on the environment are at issue and adopt the Aarhus Convention provisions relating to participation and access to justice at reasonable cost and to the provision of guidance, support and funding for environmental cases.

16. We propose that the provisions for public guidance and funding for public interest legal and expert interventions be included in the NAP4. Aarhus is specific to the environment, but similar provisions could be adopted for other public interest access to justice.

E. Participation and Official Information Act response timeframes

Contributor: Environment and Conservation Organisations of Aotearoa New Zealand (ECO)

- a. **Problem 5:** Although officials are required to respond within 20 working days, it is common that response times are extended by the agency involved, and/or refinement sought in the first seven days. The refined request then restarts the

clock so the 20 days' time frame is restarted. This leads to significant delays in responses.

Agencies should not be allowed to delay the supply of information beyond its usefulness. In particular they should be required to supply requested information earlier so it can be used in decision-making process time frames.

- b. **Solution 5:** The OIA and LGOIMA need to be strengthened so that when there is a live public participatory process, information is supplied within the consultation time frame to enable the public to make use of it before deadlines for input.

Public reporting and effective penalties must apply to agencies who delay beyond the point when information is of use for public or stakeholder input, or if they overuse the time extension provisions or the "please refine your request" device.

There should also be refinements to the OIA to provide for greater public access to the development of New Zealand's positions in international negotiations.

F. Strengthening Democracy and Active Citizenship

Contributor: Trust Democracy

17. To help you think about the strategic goals and commitments you might pursue through Aotearoa NZ's membership of the Open Government Partnership (OGP) and associated National Action Plans (NAPs), Trust Democracy (TD) has provided you with:

- A link to the *Democracy 'after' COVID* workshop that we recently ran
- An overview of the issues faced by many democratic countries including Aotearoa New Zealand
- Evidence gathered by the OECD about using and institutionalising deliberative democracy.

Democracy 'after' COVID

18. Trust Democracy (TD) organised the *Democracy 'after' COVID* workshop recently and recommends that you watch or listen to the recording via the following URL: <https://bit.ly/3xmWwK>. If your curiosity is piqued, please check out some of the other posts on the Trust Democracy website including *On the path to democratic renewal* and *'Homework' for Democracy*.

19. The workshop was led by Prof. Lyn Carson, the Research Director of The newDemocracy Foundation, Australia. It covered the long (2500 year), medium (250 year), and short (100 year) history of democracy before looking at some of the most promising contemporary democratic innovations and considering the future. TD believes that understanding the various institutional forms democracy has taken, and the reasons used to justify them, is essential to assessing the current state of, and visions for, our democracy.

20. The OGP was founded 10 years ago to promote democracy and democratic governance at local, regional and national scales in the face of widespread democratic malaise. Since then, the legitimacy of, and trust in, elected governments and representatives has declined sharply in many places (e.g. UK, US, Europe, Australia). While in late 2020, Aotearoa NZ appeared to have bucked the trend, issues of distrust in, and disillusionment with, our political system and its elite are present here too, and are likely to grow as we face complex problems in the future. Prof. Carson suggests the fundamental goal of democracy is social cohesion, so how do we achieve this?

21. What seems clear is that democratic governments have struggled to adequately address the issues that people care about (e.g. climate change, housing, inequality). TD suggests that they will not be able to address them without finding much better ways of bringing people into policy, decision-making and action, and without institutional innovation such as the use of representative, deliberative mini-publics with mandated responses to citizens' recommendations from elected representatives. For this reason, it would also be worth reviewing the OECD's recent report called

Innovative Citizen Participation and New Democratic Institutions: Catching the deliberative wave, which is available at: <https://bit.ly/2ZpqAvl>. We've listed at the end of this note the OECD's summary of the lessons learned and essential principles for successful deliberative processes.

22. Given the importance of a well-functioning democracy, TD recommends that you consider a NAP4 commitment that uses a deliberative mini-public made up of community representatives selected by lottery, to investigate ways of strengthening our democracy. This could be modelled on the recent Citizens' Assembly of Scotland, its work on 'Doing Politics Differently' and the very well received formal response of the Scottish Government - see <https://bit.ly/30ZVdbr> and <https://bit.ly/3CVq4mp>.

OECD reasons for using deliberative democratic processes

23. Evidence collected by the OECD and existing research in the field of deliberative democracy point to six key reasons why representative deliberative processes can help lead to better public decisions and enhance trust (OECD, 2020):¹
 - a. **Better policy outcomes deliver considered public judgements rather than off-the-cuff public opinions.** Most public participation exercises are not designed to be representative or collaborative, and can be adversarial rather than find solutions or common ground. Deliberative processes have proven to create spaces for learning, deliberation and developing informed recommendations which are of greater use to policy and decision-makers.
 - b. **Greater legitimacy to make hard choices.** Deliberative processes help inform policy to better support and provide greater understanding of public priorities, and the values and reasons behind them - and to identify where consensus is feasible. Evidence suggests that they are particularly useful in situations where there is a need to overcome political deadlock or make difficult trade-off decisions.
 - c. **Enhance public trust in government and democratic institutions by giving citizens an effective role in public decision making.** People are more likely to trust a decision that has been influenced by the considered judgment of everyday people, rather than that made solely by the government.
 - d. **Make governance more inclusive by increasing opportunities to deliberate with diverse communities.** Deliberative processes are strengthened by civil society and may include people who typically would not contribute to community engagement or public policy and decision making. These missing voices are likely to include people who are disengaged from politics, but also women, young people, diverse ethnicities and marginalised populations.
 - e. **Help counteract polarisation and disinformation.** Empirical research has shown that echo chambers that focus on culture, identity reaffirmation, and

¹ Source: <https://www.oecd.org/gov/open-government/good-practice-principles-for-deliberative-processes-for-public-decision-making.pdf>

polarisation do not survive in deliberative conditions, even in groups of like-minded people (Dryzek et al., 2019; see Grönlund et al., 2015).

- f. **Provide a long-term vision on policy issues.** Deliberative democracy processes have shown that citizens can identify long-term solutions that go well beyond short-term policies which are linked to electoral cycles.

OECD essential principles for successful deliberative processes

Influence

24. It is important to be clear about the impact and the work by civil society. A public commitment to responding to or acting on recommendations quickly increases future opportunities to participate and influence decisions.

Democratic lottery – should reflect the community

25. Most engagement by the government does not enable a representative cross-section of the community to be heard. Actively working to ensure diversity and inclusion of views are important principles in democracy. Participation of Maori, Pacific, minorities and underrepresented groups should be a given to maximise inclusion.

A clear remit

26. A clear, plain-language challenge or question should be asked of the group. It should be a neutrally-phrased question that explains the task, shares the problem and provides a strong platform for discussion about priorities and trade-offs. The question will determine the scope of the process, setting the boundaries for what the group is considering.

Transparency

27. The deliberative process should be announced publicly before it begins. The process design and all materials – including agendas, briefing documents, evidence submissions, audio and video recordings of those presenting evidence, the participants' report, their recommendations (the wording of which participants should have a final say over), and the random selection methodology – should be available to the public promptly. The funding source should be disclosed. The commissioning public authority's response to the recommendations and the evaluation after the process should be publicised and have a public communication strategy

Diverse information to meet the needs of our populations

28. Participants should have access to a wide range of transparently-sourced, relevant, and accessible evidence and expertise, and are able to request additional information. Citizens should spend extensive time asking questions and identifying sources they trust for the information they need.

Adequate time

29. Deliberative processes develop participants' thinking on a complex issue by giving them multiple opportunities to question experts, learn from one another and find agreement on trusted sources of information. Best practice deliberation requires

adequate time for participants to learn, weigh evidence, and develop collective recommendations, and enable due consideration of the issue.

Dialogue and deliberation, not debate

30. Group deliberation entails finding common ground; this requires careful and active listening, weighing and considering multiple perspectives, every participant having an opportunity to speak, a mix of formats, and skilled facilitation. Working together to establish common ground improves the ability to discover, understand and understand where there is agreement.

A free-response

31. A group should not be asked to (critically) review a government or parliamentary reform proposal (or proposals which are entirely written by active stakeholders). Instead, participants should be given a ‘blank page’ to provide their own set of recommendations with a rationale and supporting evidence that emerges from their shared learning.

G. Secrecy Clauses and Proactive Publication

Contributor: New Zealand Council for Civil Liberties

32. The NZ Council for Civil Liberties' contribution to your summer reading takes the form of articulating a problem that needs addressing, and an opportunity that could be grasped as part of the next National Action Plan.

The problem to address - Secrecy clauses

33. The government has taken a number of positive steps in relation to access to information. However, the government's credibility on openness is seriously undermined by the all-too-frequent introduction of legislation that contains a secrecy clause.
34. These clauses are sometimes formulated as confidentiality provisions that apply to too much information, or that only permit disclosure in limited circumstances. These can mean OIA requests have to be refused under section 18(c)(i) as being 'contrary to the provisions of a specified enactment' - to which, of course, no public interest test applies. On other occasions, Bills have amended the definition of 'official information' in the OIA, in order to place certain kinds of information outside the scope of that Act, even though the organisation is still covered by it. The table below sets out some of the provisions introduced in the last four years. There are many more, enacted previously. Some of these echo pre-OIA legislation, or early post-OIA legislation (e.g. s.100 of the Commerce Act), so date from an era when ideas around the balance between secrecy and openness were very different.
35. What appears to be happening is that every department thinks it has a 'special case' why the issue of disclosure or non-disclosure should not be dealt with under the OIA's regime for weighing competing public interests. Often clauses seem to have the intention of providing reassurance to people or organisations outside government that information which they may have to provide to government for particular purposes will not be disclosed by the department.
36. What these clauses signal is that the department does not trust or understand how the OIA works. Perhaps even more significantly, such clauses indicate that the government does not trust the Ombudsman to make the right decision on disclosure or withholding if they receive a complaint about a request being refused. The Council does not believe that this is a message that the government wishes to convey, but it is the signal that is being sent by this stream of secrecy clauses.
37. The Council hopes this is a problem that can be addressed through amendments to the procedures agencies must follow when developing legislation. There is an opportunity here for the government to strengthen its credentials regarding openness. We suggest the following, but would be happy to discuss these with you or officials:
- a. A foundational step is for the Ministry of Justice to build into its guidance and procedures (and acknowledge on its website) that international human rights jurisprudence now clearly recognises that laws such as the OIA give effect to Article 19 of the International Covenant on Civil and Political Liberties, and that as

such, any clauses restricting the publication or disclosure of information are interferences with section 14 of the New Zealand Bill of Rights Act.

- b. If this step is taken, it means that all such proposals will have to pass through a Bill of Rights Act vetting process.
 - c. However, we think there needs to be an explicit obligation on departments when advancing legislative proposals that contain any kind of secrecy provision to set out clearly why the withholding grounds in the OIA are insufficient to protect the information they want their new provision to keep secret.
 - d. Departments' claims need to be tested. We suggest that before they get to the stage of sending proposals to Cabinet (let alone drafting instructions to Parliamentary Counsel), they are required to consult the Ministry of Justice and the Ombudsman, and the documentation of that consultation published. We would also like departments to be required to publish a paper on these aspects of its proposals for public comment. In our experience, waiting until a clause is in a Bill being considered before a select committee is far too late in the process to rectify these matters. By that stage not only is the department invested in getting the Bill through the House, but so is the Government. And committee members and agencies know that if they agree to amendments, they are creating further work for ministers. It's much better to sort out these attempts to create secrecy clauses earlier in the policy and legislative design process.
38. To deal with the existing secrecy clauses on the statute book (and research indicates there are more than 70 of them - the table below is a subset from the last four years), the OIA could be strengthened in two ways. Our preference would be for a 'notwithstanding' provision to be inserted, meaning that the OIA always overrides the secrecy clauses in other legislation. An alternative – one found in the UK's Freedom of Information Act 2000 – is to have a provision enabling a Minister to amend or repeal a secrecy clause by order. This then needs to trigger an exercise where all existing secrecy provisions are reviewed from first principles. This was originally the task of the Information Authority, in section 38 of the OIA as it was first enacted. Experience over time indicates the Authority should not have been disestablished by a sunset clause, not just in relation to secrecy clauses, but also in relation to proactive disclosure, which we deal with below.

Bill/Act	Clause/ Section	Enacted date of secrecy clause	Type of information	Effect of provision
Canterbury Earthquakes Insurance Tribunal Act 2019	33	2019	Mediation	Exempts mediation information from the OIA
Climate Change Response Act 2002	5P	2019	Originator Control (ORCON)	Climate Commission must keep secret information disclosed to it by EPA

Criminal Cases Review Commission Act 2019	37	2019	Investigation	Exempts communications related to investigations from OIA
Insolvency Practitioners Regulation Act 2019	62	2019	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Local Government Act 2002	35A	2019	Exemption	Temporarily exempts information on local govt reorganisations or disputes held by Local Government Commission from OIA
New Zealand Infrastructure Commission/Te Waihanga Act 2019	26	2019	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Tax Administration Act 1994	18	2019	Secrecy	Revenue officers must keep sensitive revenue information confidential
Venture Capital Fund Act 2019	25	2019	Agency exemption	Exempts subsidiaries of VCF from OIA
Climate Change Response Act 2002	30GF	2020	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Land Transport Management Act 2003	109A	2020	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Privacy Act 2020	206	2020 (initially in 1993)	Secrecy	Commissioner and staff must maintain secrecy – not just for investigations but also for policy advice to government

Financial Market Infrastructures Act 2021	142	2021	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Reserve Bank of New Zealand Act 2021	269	2003 (in old Act)	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Civil Aviation Bill	199	TBA	Publication prohibition	Allows Minister to temporarily prohibit publication of information relating to international air cooperation application
Civil Aviation Bill	456	TBA	Secrecy	Prohibits publication of information acquired by agency except in specified circumstances
Commerce Amendment Bill	32	TBA	ORCON	requires confidentiality of shared information
Organic Products Bill	44A	TBA	Secrecy	Prohibits use of information provided for any other purpose
Protected Disclosures (Protection of Whistleblowers) Bill	17	TBA	Refusal ground	Allows information which would identify whistleblowers to be withheld under OIA
Screen Industry Workers Bill	32C	TBA	Type Exemption	Excludes collective agreements delivered to chief executive from the OIA
Electricity Industry Amendment Bill	47B	TBA	ORCON	Agency may impose conditions limiting use of information shared with other agencies

Oversight of Oranga Tamariki System and Children and Young People's Commission Bill	59	TBA	Amends definition of 'official information'	Removes communications between the Ombudsman and child-support agencies from the coverage of the OIA. Not just investigation-related communications - they're already exempt - but everything, no matter how trivial.
Oversight of Oranga Tamariki System and Children and Young People's Commission Bill	109	TBA	Secrecy	Commission and every employee of the Commission must maintain secrecy in respect of all matters that come to the knowledge of the Commission or the employee in the course of any inquiry.

The opportunity to grasp - Proactive disclosure

39. This government has made significant progress with proactive disclosure, including adoption of Cabinet Circular 18(4) on publication of Cabinet papers, publication by some ministers of briefings they've received from departments, and publication of ministerial diaries.
40. New Zealand's proactive disclosure practices have grown up organically over the decades since the passage of the OIA, generally in response to Ombudsmen conveying consistent lines of interpretation about where withholding grounds do not apply, or where the balance of public interest favours disclosure. This can lead to good institutional support for the disclosures, rather than seeing them as an unwelcome external imposition.
41. However, there are also problems with practices that have grown up organically. These generally stem from two sources: the lack of a policy or legislative framework to regulate or guide this activity, and each Minister and department deciding how to give effect to the various proactive disclosure initiatives. This has led to what can be fairly described as patchy performance.
42. The Minister of Justice has signalled that he will not make a decision on whether to proceed with a review of the OIA until later in this parliamentary term. This creates an opportunity to do some of the thinking on proactive disclosure in advance of any review. Doing this work in the context of an OGP commitment in the next Action Plan would be ideal, because of the expectations that such work would be done (a) in the

open and (b) in conjunction with the public and civil society. It would give effect also to the OIA's purpose of enabling people to effectively participate in the development of policy.

43. This comprehensive collaborative work on proactive disclosure should include:

- a. What the Information Authority recommended during its existence
- b. What freedom of information legislation and non-statutory practice has led to in other countries – learning from other countries is a key aspect of the OGP
- c. How the withholding of information from proactively released documents can be challenged before the Ombudsman without people having to make a fresh OIA request for an unredacted copy of it
- d. Defining classes of information for proactive disclosure
- e. Standards for the formats in which information is released, so that it is as accessible as possible to people with vision impairments (DIA, TKM and the Ombudsman have already done work on this, but again compliance is patchy)
- f. The creation - with public input to its design - of either a central online portal to which departments must upload these documents (like Norway and Mexico), or mandatory standards for how and where the information is published by each department. Both of these would need to be developed in line with the all-of-government Digital Service Design Standards, which have principles concerning 'working in the open' and 'including service users in the development process'
- g. Co-development of a draft set of amendments to the OIA to incorporate the proposals developed during the commitment, should a review of the OIA be initiated by the Minister of Justice.