

**Open Government Partnership**

**New Zealand's 4<sup>th</sup> National Action Plan**

**Submission to the Public Service Commission**

**Andrew Ecclestone**

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## About the submitter

1. I am a researcher and policy analyst, specialising in freedom of information legislation, policy and practice since 1993. I am a former Senior Investigator Official Information Practice Investigations in the Office of the Ombudsman, where I worked for 12 years. I have a Master's in Public Policy from Victoria University of Wellington and am currently a Senior Associate in the Institute for Governance and Policy Studies at Victoria University of Wellington where I am working on a New Zealand Law Foundation funded project on open government.

## Introduction

2. This submission provides a number of suggestions for commitments in New Zealand's fourth National Action Plan as a member of the Open Government Partnership.
3. The lessons learned from the ambition and performance in relation to previous action plans, together with the implications of the Public Service Act 2020 suggest that while ambitious commitments are needed, many of those relate to basic capacity and capability building for open government. Previous assumptions about the quality of New Zealand's democracy and the capability and capacity of the public service to lift performance up the IAP2 spectrum have proven to be flawed, so we need to be honest with ourselves about the scale of the tasks ahead of us, and the foundation laying that needs to be done in this action plan.
4. No priority relating to the suggestions below should be inferred from the order in which they appear.

### 1. Continuing Commitment 11 from NAP3

What	Why
Continue commitment 11 from the 2018-2020 NAP, to 'release and maintain an authoritative dataset of government organisations as open, machine-readable	Because (a) the work on this commitment has not been completed; and (b) it is important that this work continues under the aegis of an OGP commitment so that agencies know that they will be expected

What	Why
<p>data to enhance the transparency of government structures to the public’.</p> <p>Actions required include actually funding public servants to work on this, and explicitly mandating agency Chief Executives to (a) cooperate and support this work and (b) begin work to scope what adaptations will need to be made to their business systems to make use of the dataset.</p>	<p>to collaborate with those outside government while developing the dataset.</p> <p>DIA should continue to lead this work as they’ve been doing it well, and the combination of being responsible for digital government, the National Library, Archives NZ and local government means that they’ve got a strong departmental interest in it succeeding.</p>

## 2. Adopt the Open Contracting Principles and implement the Open Contracting Data Standard

What	Why
<p>Commit to using the <a href="#">Open Contracting Data Standard</a> and <a href="#">Principles</a> for all government procurement, regardless of whether the procurement is done via GETS, an all-of-government panel of approved suppliers, or direct procurement by an agency.</p> <p>The actions required for this commitment will include:</p> <ul style="list-style-type: none"> <li>a) MBIE (as owner of procurement policy for the government) to continue the work they started under commitment 12 of the 2018-2020 NAP, and issue a consultation document to the public, agencies and suppliers for comment;</li> <li>b) publication of the analysis of the submissions received in response to the consultation document;</li> <li>c) public consultation on draft advice to Ministers;</li> </ul>	<p>Government procurement is a significant portion of public spending and this commitment would significantly improve the transparency and accountability of public spending.</p> <p>While the work on commitment 12 of the current NAP provides open data of contract award notices for procurement conducted using GETS, an increasing proportion of procurement is done away from GETS through other channels such as all-of-government panels of approved suppliers.</p> <p>The desired outcomes for this commitment are:</p> <ul style="list-style-type: none"> <li>a) Government adoption of the principles and data standard to apply across central government agencies (regardless of whether they are public service agencies or wider state sector) – which will require changes in systems and process;</li> </ul>

What	Why
<p>d) providing advice to Ministers that may be revised in light of this second round of consultation;</p> <p>e) Ministers making a decision by December 2021; and</p> <p>f) if the decision is to commit to the Data Standard and Principles, co-design of the guidance and standards for implementation by MBIE and other agencies.</p>	<p>b) increased competitiveness of government tendering and better value for public money;</p> <p>c) cumulative gains in strengthening the integrity of public procurement (and thereby reducing opportunities for poor quality procurement and corruption) through adoption and implementation of an open data standard that will enable linking data with company ownership and directorships and other datasets.</p>

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

What	Why
<p>A decision by the Government to accede to the Aarhus Convention (properly known as the UNECE <a href="#">Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters</a>).</p> <p>This is going to require the following actions:</p> <p>a) Establishment of a joint civil society and government working group to scrutinise the implications of accession for New Zealand.</p> <p>b) Provision of advice to Ministers on the benefits and implications of acceding to the Convention;</p> <p>c) A Minister (probably the Minister for the Environment) proposing accession to Cabinet, and Cabinet agreeing to it;</p>	<p>The Aarhus Convention is a UN convention that gives effect to <a href="#">Principle 10 of the 1992 Rio Declaration</a>. This said (in effect) that if countries were to be successful in protecting the environment, they needed to empower the public with rights under three pillars: the right to information about the environment and its management, a right to participate in decision-making about the environment, and a right of access to justice on environmental issues. Further information here: <a href="http://www.unece.org/env/pp/introduction.html">http://www.unece.org/env/pp/introduction.html</a></p> <p>If NZ accedes (signs up to) the Convention, it will have to ensure its domestic legislation meets the Convention standards. This will have the effect of putting in a ‘floor’ on each of the three pillars to safeguard these rights, meaning future governments would not, for example, be able to weaken people’s rights to participate in consideration of consents</p>

What	Why
<p>d) Commissioning a National Interest Analysis (which will draw on (a) above);</p> <p>e) Parliamentary consideration of the Convention (see <a href="#">here</a>).</p>	<p>sought under the Resource Mangement Act, or be able to suspend an elected decision making body on environmental issues as we saw in Canterbury. It is also likely that in some places the Convention would not only safeguard minimum standards, but would raise the requirements for openness. Two examples: the Convention would not allow information about emissions into the environment (eg from a manufacturing or agricultural process) to be refused on grounds of commercial sensitivity if sought under the OIA; and it is likely we would see capped legal costs for groups wanting to bring challenges of government decisions on issues affecting the environment to the courts.</p> <p>The bigger picture reasons for why we should press for inclusion of this commitment are climate change and biodiversity collapse. As these two closely related problems become ever more urgent to address, we may see governments seeking to act in a more authoritarian or <i>dirigiste</i> manner to adopt measures intended to address the problems we face. However, in a democracy, the legitimacy of these measures rests on public involvement in their creation and implementation. The Aarhus Convention helps cement public rights, which in turn will help ensure democratic legitimacy.</p>

#### 4. Adoption of mandatory all-of-government standards on public consultation

What	Why
<p>To adopt mandatory all-of-government standards on public consultation in policy development and service design, and</p>	<p>There is still wide variation in the quality of public consultation undertaken across the public sector. This means that policy</p>

What	Why
<p>require all government consultations to be published on a central online portal built on an open linked data standard.</p> <p>This is going to require actions such as:</p> <p>a) Publication of the results of the Policy Project’s consultations on public engagement experiences, and its analyses of them;</p> <p>b) Publication of a draft policy paper to Ministers on options for a mandatory all-of-government standard for consultation exercises, and inviting submissions on this draft policy paper;</p> <p>c) Collation and publication of the submissions on the draft policy paper and providing the final draft of the policy paper to Ministers;</p> <p>d) Approval by Ministers of a move to create mandatory standards for consultation exercises, and the resources to do the work and build a enhanced portal based on an open data standard;</p> <p>e) Co-creation of the open data standard (or adoption of an existing open data standard) for the consultation listings portal, and public consultation on the final draft (if not iterative consultations as the draft standard is developed);</p> <p>f) Co-creation of the consultation standard, and public consultation of the final draft;</p> <p>g) Publication of the submissions received on the draft consultation standard, and of the analysis of the standards;</p> <p>h) Provision of the final text to Ministers for approval and adoption; and</p>	<p>makers and service designers are not hearing from all those with an interest in the issue they are working on, which is likely to result in gaps in their understanding of the issues, and thence flawed policy options or services.</p> <p>Problems include:</p> <ul style="list-style-type: none"> <li>▪ not advertising the consultation to the public, because it’s more convenient for an agency to undertake ‘targeted consultation’ with cherry picked ‘stakeholders’</li> <li>▪ submission periods that are too short, thereby constraining the ability of people (including civil society groups and private sector organisations) to adequately consider the proposals, formulate a response, have the draft response considered by their organisation’s governance bodies</li> <li>▪ not making the consultation documents available in an accessible format – too often documents are in PDF only, which – besides the problems of this format for people with visual impairments – hinders copying and pasting text into submissions as quotations</li> <li>▪ no automatic publication of the submissions, let alone within a specified timeframe, such as two weeks following closure of the submission period</li> <li>▪ no automatic publication of officials’ analysis of the submissions – which is quite distinct from the options they propose to Ministers or other decision-makers</li> <li>▪ no central location online where people know they can be sure that all</li> </ul>

What	Why
<p>i) Funding of work to implement the standard and monitoring compliance with it.</p>	<p>consultations being undertaken by all agencies are listed. The current portal on govt.nz does not list them all – not even the current process for developing this action plan.</p> <p><a href="#">The Policy Project</a>, run out of the Department of Prime Minister and Cabinet, has been consulting on people’s experiences of government consultations. (Again this does not appear to have been listed on the central consultation portal – the irony is deep). It has also been leading commitment 5 in the 2018-2020 NAP, to <i>‘develop a deeper and more consistent understanding within the NZ public sector of what good engagement with the public means (right across the IAP2’s Public Participation Spectrum)’</i>. It’s time this work resulted in something that the public can meaningfully hold agencies to account with regard to consultation exercises. The UK had similar standards 20 years ago, with, for example a minimum 12 week consultation period. See <a href="#">here</a>.</p> <p>To get the maximum benefit out of this, and to enable the creation of tools which enable people to set up customised alerts when consultations are issued on topics of interest to them, or by certain agencies in whose work they’re interested, the revised centralised portal should be built on an open data standard. This, for example should include geospatial metadata about the area the relevant consultation applies to: national, regional, local authority, ward level, district health board, and so on. This would enable the creation of interfaces which would let people navigate to find consultations via a map-based interface.</p>

## 5. Legislated standards on process prior to removing any information or organisation from the scope of the Official Information Act

What	Why
<p>Legislation requiring specific procedures and methods to be followed before any clauses prohibiting disclosure of official information are inserted into legislation, and to mandate the setting up, carrying out and completion of a project to review existing secrecy clauses, and making recommendations for their removal or amendment, so that wherever possible the Official Information Act is the legislation that governs whether information will or will not be disclosed on request.</p>	<p>There have been numerous instances in recent years of government departments inserting secrecy provisions into legislation they are preparing for introduction to Parliament. Very often these clauses are completely unnecessary as the Official Information Act (OIA) already provides a withholding ground that could be used to refuse a request. On principle, the OIA should be the legislation governing disclosure or non-disclosure of information held by agencies – other legislation should not create ‘end-runs’ around it to cut out the public’s right to seek this information.</p> <p>These efforts by departments have often failed to comply with the Cabinet Manual and Legislation Design Advisory Committee guidance to consult with the Ministry of Justice and Ombudsman before introducing legislation into Parliament that cuts out rights under the OIA.</p> <p>Given these failures on both a practical and principled level, it’s time to elevate the requirements on agencies from following guidance to following the law, by making public consultation on proposed secrecy clauses mandatory prior to a Bill being introduced to Parliament. This is because experience also suggests that trying to get such secrecy clauses removed once a Bill is introduced to Parliament is a nigh-on impossible task. MPs simply do not prioritise their or the</p>



What	Why
	<p>public's right to know at this stage of the policy and legislative process.</p> <p>Given the enactment of these secrecy clauses in the past, the commitment should also include a programme of work to review existing secrecy clauses on the statute book, publish the list of such that it compiles, alongside reasons for their repeal, amendment or retention after considering how the OIA applies to such information. Such a review was conducted by the UK government in the lead up to implementation of its Freedom of Information Act. Report <a href="#">here</a> [PDF].</p>

## 6. Improving the Parliament website for passage of Bills

What	Why
<p>Bring on to one page for each [government] Bill introduced to Parliament the information needed by the public to make higher quality written and oral submissions.</p> <p>This includes links from each page about the Bill to (a) the Attorney-General's advice on the Bill's NZ Bill of Rights Act compliance, (b) the Regulatory Impact Statements on the Bill, (c) the Climate Impact Assessments <a href="#">where one is required</a>.</p> <p>It also should include a requirement that written submissions on Bills are published before oral submissions commence, and that committees publish in advance the dates and times and names of each oral submitter, so that people can make informed decisions about when they may want to attend the committee to listen to other submitters.</p>	<p>At present, select committees that invite written submissions on a Bill provide only a link to the Bill on the legislation.govt.nz website. They do not provide links to the Attorney General's NZBORA statements either <a href="#">under section 7 of the Act</a>, or on <a href="#">consistency with the Act</a>, meaning submitters – if they know about them – have to go off and hunt these down. They also do not link to the Regulatory Impact Statements that departments are required to create, and which are <a href="#">listed on the Treasury's website</a>. In future, some Bills will require statements with regard to their climate impact. It is likely that these too will be tucked away on some Ministry's website, requiring submitters to go and hunt for these too.</p> <p>If Parliament is serious about wanting to solicit high-quality submissions to help it with scrutiny and analysis of legislation, it needs to do more to help people find the relevant information produced by officials</p>

What	Why
	<p>as part of the process for developing and introducing the legislation.</p> <p>Closely related to this, Select Committees only publish bare dates and times for their hearing on Bills, see for example this <a href="#">Schedule of Meetings</a>. Unlike their <a href="#">UK counterparts</a>, no information is provided about which person or organisation is submitting at any session, which means that if an interested person wants to go and listen to the submission from someone else – say an expert in the relevant field – they have no way of finding out when this person will be appearing before the committee. It is entirely possible to do this, as the Committee secretariats arrange the dates and times of oral submissions in advance of the relevant sessions – it requires a change of practice, and possibly some additional resourcing.</p> <p>The outcome would be higher quality submissions and higher levels of public engagement with select committee’s vital work of scrutinising Bills at this stage of the legislation’s progress through the House.</p>

## 7. Construction or purchase of Parliamentary video platform for live-streaming select committees

What	Why
Streaming select committees and providing video recordings on Parliament’s own web platform instead of relying on Facebook.	Active citizenship requires adequate publishing platforms for people to watch and find video feeds and recordings of parliamentary proceedings, including select committees. At present New Zealand does not have a fit-for-purpose video streaming platform to enable

What	Why
	<p>informed public participation in the proceedings of Parliament.</p> <p>It's embarrassing that a country such as New Zealand relies on a website such as Facebook to livestream video of oral submissions to select committees.</p> <p>Facebook has repeatedly been shown to have enabled mass disclosures of people's personal data, and constantly manipulates the information presented to users of the site. Many people have either avoided joining Facebook or have left the site because they are unhappy about the company's conduct. While it is not necessary for a member of the public to join Facebook to watch videos from select committees, visiting the site without knowing how to take suitable precautions will result in Facebook track their use of other websites. New Zealand's Parliament should not be using a tool that facilitates this conduct.</p> <p>Facebook also has technological limitations in terms of being able to search for videos of specific submitters, or to watch submissions given at a particular time: if the videos are timestamped, it does not appear this is surfaced to people not signed in to the site. This means the site is all but useless in enabling people trying to find video recordings of specific submitters or specific questions from MPs.</p> <p>Parliament should commit the resources to develop and implement its own video streaming and recording platform, built on open non-proprietary standards, and not tied to any web platform provider following completion of the contract it has tendered for development and implementation of the technology. There</p>

What	Why
	<p>are pre-existing providers of such technology within New Zealand.</p> <p>If Parliament does not want to develop its own platform, it should buy the system developed for the (bilingual) Welsh Assembly. See, for example, this page: <a href="https://record.assembly.wales/Committee/5542">https://record.assembly.wales/Committee/5542</a></p>

## 8. Hansard for select committee oral submissions

What	Why
<p>Hansard for select committee oral submissions/testimony.</p>	<p>Unlike the UK Parliament, where select committees publish transcripts (Hansard, <a href="#">example</a>) of oral evidence sessions before select committees, the New Zealand Parliament does not appear to do as standard. This makes it much hard for those wishing to participate in the process of scrutinising departments and legislation. They either have to know when to be in the room to listen and make notes in person (even though details of submitters are not published in advance) which is pretty difficult for people even in Wellington, or they have to be willing to trawl through hours of video on Facebook.</p> <p>A decision by Parliament to commit the resources to producing and publishing Hansard of select committee's public sessions would be an enormous benefit not only to those outside Parliament wishing to participate, but also to MPs, committee secretariats and government officials.</p> <p>[See also, Welsh Assembly example: <a href="https://record.assembly.wales/Committee/6347">https://record.assembly.wales/Committee/6347</a>]</p>

## 9. Increased independence for select committee scrutiny of submissions

What	Why
<p>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.</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>

## 10. Reform of the Official Information Act and its local government counterpart

What	Why
<p>While the government has postponed a decision on whether to review the Official Information Act, there appears to be agreement that amendments to the legislation are needed, as well as improvements to agency practices.</p> <p>A joint working party of civil society and public servants should be convened to discuss the issues and areas for reform short of a full re-writing of the legislation. This will need to operate in both the spirit of the OIA's participative purpose and the Public Service Act's principle of fostering a culture of open government.</p>	<p>Work is needed to strengthen people's rights to information as this is the foundation of the public participation in making and administering laws and policies, and holding Ministers and officials to account – the core concepts of open government.</p> <p>Not all of this can be achieved solely through guidance and training: amendments to the law are needed.</p>

## 11. Head of Profession and Community of Practice for Public Participation

What	Why
<p>Create an all-of-government head of profession for public participation who would be responsible for developing knowledge, capability and capacity, and standards in agencies across the government, as well as supporting a community of practice that supports learning and development amongst people working in this field.</p> <p>Design of this should be done jointly with civil society as the demonstration of practice in relation to its own field will send important positive signals as well as providing learning opportunities.</p>	<p>Poor public engagement is a very common complaint and has been a consistent theme during the development of every NAP during New Zealand's membership of the OGP. Addressing this is necessary if the Public Service is to fulfil its statutory duty to 'foster a culture of open government'. Agencies lack the knowledge and capacity to do this without support.</p>