# Independent Reporting Mechanism

## Kenya Co-Creation Brief 2023

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# Introduction

This brief from the OGP's Independent Reporting Mechanism (IRM) serves to support the co-creation process and design of the fifth action plan and to strengthen the quality, ambition, and feasibility of commitments. It summarizes the opportunities and challenges for open government in the country context and presents recommendations. These recommendations are suggestions, and this brief does not constitute an evaluation of a particular action plan. Its purpose is to inform the planning process for co-creation based on collective and country-specific IRM findings. This brief is intended to be a resource as government and civil society determine the next action plan's trajectory and content. National OGP stakeholders will determine the extent of incorporation of this brief's recommendations.

The co-creation brief draws on the results of the research in prior IRM reports for Kenya and draws recommendations from the data and conclusions of those reports. The brief also draws on other sources, such as *OGP National Handbook*, *OGP Participation and Co-creation Standards*, and IRM guidance on the assessment of OGP's minimum requirements and the minimum threshold for "involve". It draws on these sources to ensure that recommendations provided are up to date in light of developments since those IRM reports were written and to enrich the recommendations by drawing on comparative international experience in the design and implementation of OGP action plan commitments and other context-relevant practice in open government. The co-creation brief has been reviewed by IRM senior staff for consistency and accuracy with a view to maximizing the context-relevance and actionability of the recommendations. Where appropriate, the briefs are reviewed by external reviewers or members of the IRM International Experts Panel.

The IRM drafted this co-creation brief in February 2023.

# Table of Contents

# Section I: Action Plan Co-Creation Process

The government of Kenya joined as an inaugural member of OGP in 2011. Since, Kenya's open government community and OGP process have continuously strengthened. In 2020, Kenya joined the OGP Global Steering Committee, demonstrating its leadership regionally and internationally. Kenya's OGP community has most recently navigated the change in government following elections in 2022. Consequently, OGP moved from the Office of the Deputy President to the Office of the Prime Cabinet Secretary. The Steering Committee also postponed co-creation of the fifth action plan until the new government was installed.

The Steering Committee and Technical Committee are beginning development of Kenya's first four-year action plan in early 2023. The government of Kenya will need to submit an action plan by 31 December 2023 to remain in compliance with OGP rules and standards. Kenyan OGP community members have identified securing sustainable funding and greater inclusion of youth, women, and people with disabilities as priorities to further improve the OGP process. Co-creation of Kenya's fourth action plan was supported by funding from the Multi-Donor Trust Fund. Maintaining similar levels of participation to co-create the fifth action plan could prove a challenge without dedicated financial support.

## RECOMMENDATIONS

### Recommendation 1: Maintain an OGP website and repository to provide transparency and opportunities to participate in the OGP process.

Kenya currently does not have a working OGP website or repository. Under the updated OGP standards, countries must maintain an up-to-date OGP website and repository. To meet the new minimum requirements, countries must also demonstrate that

- the OGP website contains the latest action plan;
- they published on the OGP website, at least two weeks in advance, a co-creation timeline and information on opportunities for stakeholders to participate;
- they published basic rules on participation in the multistakeholder forum;
- the repository includes at least one piece of evidence of co-creation and one piece of evidence of implementation from the past six months; and
- they documented input received from stakeholders on the action plan.

The IRM recommends that the Steering Committee identify the optimal platform to provide current and sustained information on OGP activities and opportunities for the public to engage. For example, see Tunisia's Facebook page and website and Côte d'Ivoire's Facebook page and website. The Steering Committee could complement a website or social media page with a public Google Drive or Dropbox folder to publish more detailed information.

### Recommendation 2: Strategically plan for long-term institutionalization of OGP.

After the 2022 elections, OGP shifted from the Office of the Deputy President to the new Office of the Prime Cabinet Secretary. In the short term, OGP's placement within the executive office demonstrates the current administration's commitment to open government reforms. Historically, many countries relocate OGP from the executive office to a ministry or agency to ensure continuity through political transitions. For example, Nigeria and Liberia have permanent OGP Secretariats within ministries with dedicated OGP staff. OGP research has found that stable OGP institutions and less turnover in OGP leadership is associated with better open government results. The conclusion of the elections and adoption of a four-year action plan will likely provide

a period of stability where the OGP Kenya community can consider long-term plans for OGP's sustainability in Kenya. Reformers are encouraged to think strategically regarding what location and structure for OGP would be most conducive to ongoing political commitment, funding, and effective coordination across government and with nongovernment partners.

## Recommendation 3: Institutionalization of OGP in Kenya can advance open government within and beyond the legislature.

The Parliament of Kenya has sought to increase legislative openness under all four previous OGP action plans. Senator Kiprotich Arap Cherargei announced the launch of Kenya's first Parliamentary Caucus on OGP on 16 March 2023. The senator also called on Parliament to advance the Public Participation Bill and to allocate resources to support Kenya's open government commitments. Co-creation of the fifth action plan is an opportunity to deepen parliamentary engagement through the formation of an OGP Caucus and Senate Standing Committee. These bodies can go beyond activities to open Parliament to also shepherd legislation, ensure appropriate budget allocation, and provide oversight across open government reforms. The 2022 election presents an opportunity to sensitize new members of Parliament to open government principles and processes.

The Steering Committee can look to examples from the region. Members of Parliament have been represented on Ghana's OGP Steering Committee since its inception. In the 2021–2023 action plan, Ghana aims to deepen parliamentary engagement through a Parliamentary Open Government Steering Committee and an Open Parliament Plan. Sierra Leone formed an OGP Parliamentary Working Group, which contributed to the passage of the Gender Empowerment Act. The Moroccan Parliament has also undertaken an Open Parliament Plan to open its own processes. More guidance can be found in the 2021 OGP Memorandum on Parliamentary Engagement and Menu of Options.

## Recommendation 4: The OGP Kenya community can plan strategically to implement an ambitious and feasible four-year action plan.

For the first time, Kenya intends to undertake a four-year action plan to align OGP with election cycles. A four-year action plan will need to balance concrete and measurable activities with flexibility to account for unforeseen circumstances and emerging lessons. IRM recommends that the OGP community consider developing a one- or two-year implementation roadmap to accompany the action plan. The roadmap can include specific short-term activities that clarify next steps and responsible actors.

For example, Jordan developed commitment-level implementation plans to supplement its four-year action plan that specify civil society's role in each milestone. The implementation period can then include moments to reflect on progress, obstacles, and lessons to inform an updated roadmap. Commitment implementers should keep in mind that there will be a refresh moment halfway through the implementation period where Kenya can expand or update the action plan. Given the fifth action plan's alignment with a new administration, drafters are encouraged to consider where open government priorities align with the administration's agenda and budget to maximize opportunity for strong implementation. Drafters are also encouraged to analyze obstacles to commitments that have seen little progress across several action plans. This analysis can inform how commitments can be reconsidered to strengthen their chances for success.

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> **Recommendation 5: The OGP Steering Committee can take the co-creation process to the next level by providing advance notice of the co-creation timeline and methodology.**
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> Kenya's co-creation process has become increasingly participatory and collaborative over time. One way the OGP Kenya team can further strengthen the co-creation process is to publish advance notice of the co-creation timeline, information on opportunities to participate, and details on the decision-making process. At a minimum, the updated standards require that countries publish a timeline and information on opportunities to participate at least two weeks in advance. The OGP Kenya team is encouraged to go further and provide information on the methodology and decision-making process for potential participants. Morocco and Jordan offer examples of a co-creation timeline. Jordan also published a document outlining the methodology it used to co-create its action plan.

# Section II: Action Plan Design

**AREAS OF OPPORTUNITY FOR COMMITMENTS**

The recommendations below cover new policy areas that promise to address government priorities through an open government approach, such as open climate change policy-making and youth inclusion in government decision-making. The fifth action plan also presents the opportunity to raise the level of ambition for ongoing reforms such as opening government at the county level, access to justice for marginalized groups, and beneficial ownership transparency for companies receiving public contracts.

> **AREA 1. Open Climate Change Policymaking**
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> Kenya's 2016 Climate Change Act institutionalized participation and transparency in climate change policy-making and placed Kenya as a pioneer in the region. At COP27 in 2022, President William Ruto affirmed the government's ongoing regional leadership. Kenya sought to further operationalize the Climate Change Act in a 2016 commitment. However, there remains opportunity to further institutionalize transparent and participatory climate change policy-making at the national and county levels. Possible avenues for a commitment include:
> - Strengthen access to up-to-date information on climate change planning, financing, and projects at the national and county levels, such as financing and projects under the Financing Locally Led Climate Action Program.
> - Collaboratively develop Climate Change Impact Assessment Regulations that offer guidance and provide for public participation assessments.
> - Engage in participatory co-creation of the 2023–2028 Climate Change Action Plan, with specific attention to the inclusion of marginalized groups and indigenous peoples; co-creation could also consider green COVID-19 recovery planning.
> - Institutionalize marginalized groups' participation in climate planning across levels of government, for example in developing county-level climate change legislation.
> - Undertake transparent and fair selection of Climate Change Council members, development of the council's mandate and procedures, and activation of transparent operations of the National Climate Change Fund.
> - Expand counties' institutionalization of the Climate Change Fund through legislation, planning committees, and building budgeting, planning, and monitoring tools.
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> On the continent, Senegal and Morocco have committed to strengthening participatory climate policymaking. Jordan has a four-year commitment to include the public in monitoring large-

scale capital investment projects. For more examples, see the OGP Environment and Climate Fact Sheet and brief on Implementing the Paris Climate Agreement through Transparency, Participation, and Accountability.

## AREA 2. Opening Government at the County Level

The OGP Kenya community has sought to expand open government at the county level. In 2020, Kenya committed to decentralize the Country Peer Review Mechanism to support citizen participation and improve public service delivery. The same year, Makueni, Nairobi, and Nandi counties joined Elgeyo Marakwet in the OGP Local Program. Nevertheless, there remains opportunity to sensitize local government and local civil society to the open government movement and to institutionalize open government reforms across counties.

The Philippines and Tunisia demonstrate how local open government can be strengthened incrementally across action plans. Tunisia began by communicating the value of open government and strengthening access to information. This created the foundation for pioneer municipalities to co-create municipal action plans. The Philippines' fiscal transparency reforms under the 2015 and 2017 action plans provided a strong foundation to implement citizen monitoring and reporting of local government units' fiscal transactions in their 2019 action plan.

Kenyan reformers can consider what activities would enable ambitious local open government reforms in the long term. For example, Côte d'Ivoire is enshrining local participatory budgeting into law, to ensure that efforts thus far are sustained and standardized across communes. Argentina illustrates a commitment to align and expand open government reforms at the national and subnational level. Reformers can also consider opportunities to focus efforts on priority policy areas, such as youth inclusion and climate change policy at the county level.

## AREA 3. Youth Inclusion in Policymaking

Youth below the age of 24 make up approximately 70% of Kenya's population. The Kenyan OGP community identified the inclusion of youth in policy-making as a priority for the forthcoming action plan. Options include involving youth directly in the OGP process, designing a specific commitment to advance youth participation, and integrating youth inclusion across the action plan. See the 2022 OGP Youth Toolkit for recommendations and examples. Example of approaches taken from across the partnership include:
- Chile and Scotland held youth roundtables to collect input to inform their action plans.
- Nigeria launched an OGP Youth Network to mainstream youth engagement across OGP thematic areas.
- Jamaica and Senegal are reviewing youth participation across government decision-making platforms and strengthening involvement.
- Morocco is creating educational materials and communication channels between youth and the parliament.
- Tunisia is facilitating the design and implementation of a dozen youth action plans at the municipal level. Papua New Guinea, Tunisia, and Romania have commitments to establish youth councils at the local level.

## AREA 4. Access to Justice for Marginalized Groups

Kenya is a global pioneer in formally recognizing customary justice mechanisms and among a handful of OGP members to commit to extending access to justice to marginalized communities. Under the previous action plan, Kituo Cha Sheria, NAMATI-Kenya, and the judiciary piloted an alternative justice center and virtual court center; they also advocated for funding the 2016 Legal Aid Act and Alternative Justice Systems Policy. These pilots indicate opportunities for Kenya to scale up access to justice through alternative and technological mechanisms. For example, the forthcoming commitment could support counties in developing Alternative Justice Policy System Action Plans and centres. Coordination and funding remain obstacles, particularly to implementing the Legal Aid Act. Reformers should strategically consider the political and financial landscape when adapting this commitment for the fifth action plan. Participation of government champions, particularly in the Office of the Attorney General, will be key to advancing ambitious reforms. Advocates can also build a broad coalition by communicating the economic case for open justice.

When designing the next commitment, reformers can consider examples from across the partnership. In 2020, Sierra Leone committed to strengthen coordination between formal and customary justice mechanisms and increase availability of community paralegals. Indonesia committed to expand accommodations for people with disabilities and improve legal aid to marginalized communities through a real-time portal and updated guidance for providers. North Macedonia increased resources for legal aid centres geared to aid the marginalized Roma community, which has helped to address discrimination.

## AREA 5. Transparency of Public Procurement Companies' Beneficial Owners

Kenya has pursued beneficial ownership transparency across the last three action plans but has yet to establish a public register. The 2017 Companies Act, 2022 amendments, and 2020 Companies Regulations now provide the legal framework for the collection of beneficial ownership data for all companies and mandate the disclosure for companies awarded public procurement tenders. Kenya's fifth action plan is an opportunity to implement the 2022 amendments through disclosure of comprehensive and verified beneficial ownership data for companies that receive public contracts. This commitment could build towards a longer-term aim for an economy-wide beneficial ownership register. Such a commitment could include milestones that

- ensure beneficial ownership data in the Public Procurement Information Portal (PPIP) meets the 2023 Beneficial Ownership Data Principles;
- explore opportunities to use beneficial ownership data in PPIP to identify the progress, obstacles, and next steps for inclusive public procurement under the Access to Government Procurement Opportunities initiative;
- collaboratively develop strong legal and institutional mechanisms for the verification, authentication, and enforcement around the provision of beneficial ownership data; and
- communicate a clear value proposition for beneficial ownership transparency tailored to key audiences such as the private sector, public officials, the media, and civil society with the aim to strengthen compliance and use.

For more guidance, reformers can look to Open Ownership's Gender and Beneficial Ownership Transparency Report and Beneficial Ownership Data in Procurement Briefing as well as Open Contracting Partnership's Publishing Beneficial Ownership Data under OCDS and Linking Open Contracting and Beneficial Ownership Data.

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