

Hon Chris Hipkins  
Minister for the Public Service  
c/o Public Service Commission | Te Kawa Mataaho  
Level 10, Reserve Bank of New Zealand Building  
2 The Terrace  
PO Box 329  
Wellington 6140

By email: [ogpnz@publicservice.govt.nz](mailto:ogpnz@publicservice.govt.nz)  
[c.hipkins@ministers.govt.nz](mailto:c.hipkins@ministers.govt.nz)

12 December 2022

Dear Mr Hipkins,

### **Draft of New Zealand's Fourth Open Government Partnership National Action Plan**

1. We are writing to provide our comments on the draft of New Zealand's fourth National Action Plan (NAP) as a member of the Open Government Partnership (OGP).
2. We address the draft commitments first, before encouraging the government to add the commitment on co-creation of a National Interest Analysis of the Aarhus Convention to the NAP next year in line with the OGP's rules on 'challenge commitments'. We then comment on other aspects of the draft action plan.

### **Draft Commitments**

3. While Trust Democracy particularly welcomes the inclusion of commitment three in this Action Plan, overall this draft NAP continues the series of disappointing and unambitious OGP action plans, produced by successive New Zealand governments, that have been mostly filled with programmes of work that were either already taking place, or planned to take place. Civil society organisation (CSO) suggestions for strengthening commitments have mostly been ignored, which leads not only to questions about why civil society should lend credence to this work by participating in action plan development, but why New Zealand is a member of the OGP in the first place. The action plans have consistently failed to demonstrate what value is added by New Zealand being a member of the OGP. The return on investment by civil society of time and effort must improve, or they are likely to decide – as several already have – that the opportunity cost for their other work is too high.
4. Throughout the NAP, there are milestones with start dates of January 2023. These are completely unrealistic, since it is widely accepted that substantive work does not begin in the public service until the beginning of February when everyone has returned from their summer holidays. The proposed end dates should recognise this and accordingly be put back a month, so that the full time period estimated for each milestone is actually available for the work.

5. Trust Democracy also notes that the NAP does not use the OGP's template for commitments, in spite of using them earlier in the process, and in spite of civil society providing completed templates for each commitment. This is disappointing and unfortunate and contrary to OGP process, as the templates require greater explanation of the 'theory of change' or 'intervention logic' for each commitment. This includes problem definition – which is different from the statement in the NAP of 'status quo', analysis of the causes of the problem, and the desired outcomes, as well as how each commitment will promote transparency, foster accountability and improve citizen participation in defining, implementing and monitoring solutions. The quality of the commitments in the draft NAP has suffered from the government not using the OGP's template.

6. Throughout the NAP, government has rejected CSO recommendations that the work on each commitment be guided by a joint working group of agencies, civil society and iwi (with inclusion where relevant of media and private sector representatives). The claim that agencies are not resourced for this is both completely unsatisfactory and indicates profound ignorance of what the OGP is about and an inability to address this, even after nine years of membership. The OGP itself states in relation to implementation of NAPs:

*Once the action plan has been submitted, the real work starts: Implementation. There are a few options during this phase. Business as usual: government implements, civil society criticizes. Or the version where both sides build a partnership, working together, setting up on-going coordination mechanisms, drawing on each-others expertise. A hybrid, with some organizations on the inside and a few others on the outside undertaking monitoring efforts is the third option.<sup>1</sup>*

7. The OGP's *National Handbook*, which sets out the rules and guidelines for OGP members says:

*Evidence from IRM reports and OGP's Decade Report show that continued stakeholder dialogue and participation during the implementation process is strongly correlated with high levels of completion and stronger results.<sup>2</sup>*

8. Trust Democracy is deeply disappointed that the government has, yet again, opted for 'business as usual' with government implementing and civil society criticising. For an agency that continually boasts about levels of public trust in the public service, Te Kawa Mataaho's way of trying to strengthen levels of trust is unusual. There is no indication of willingness to co-create the national action plan with civil society.

### **Commitment 1**

9. We agree with making use of the Policy Community Engagement Tool (PCET) compulsory across the public service. This is implied both by the use of the word 'requiring' in the 'Ambition' section, and in the undertaking to 'Develop a model standard' in the second

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<sup>1</sup> *Action Plan Cycle*, Open Government Partnership. <https://www.opengovpartnership.org/process/action-plan-cycle/>

<sup>2</sup> *OGP National Handbook: Rules + Guidance for Participants*, Open Government Partnership. Page 27. <https://www.opengovpartnership.org/documents/ogp-national-handbook-rules-and-guidance-for-participants-2022/>

milestone. We are deeply concerned that nothing in the draft commitment indicates that Te Kawa Mataaho will itself model good practice by involving civil society and interested members of the public in the delivery of this commitment. In our view, not to involve people outside government in the development of outputs promised in this commitment would demonstrate the Commission's failure to comply with its statutory duty to 'foster a culture of open government'. We met with the Public Service Commissioner in June 2021 to reiterate that work on the OGP commitments had to model fulfilment of the duty to foster a culture of open government and the Commissioner agreed with this proposition.

10. The draft NAP needs to make clear what is meant by 'model standard' in the context of the PCET. Trust Democracy believes the NAP should be explicit that the PCET will be a standard issued under section 17 of the Public Service Act 2020. Standards under section 17 are about public service conduct, and can include matters relating to the public service principles (set out in section 12 of the Act). Public engagement activities are clearly a matter of public servants' conduct, and linked to the public service principle of 'fostering a culture of open government' set out in section 12(1)(d) of the Act.
11. Milestone 1 for this commitment states that the PCET will be reviewed. The review should include input from people outside the public service who were involved in the public engagement exercises where it was used, and the results of the review should be published. Wording of the commitment should be amended to reflect this.
12. The draft commitment states that the PCET will be required for community engagement on 'significant initiatives'. What 'significant' means is undefined, and we are concerned by this. The vast majority of government policies and decisions are significant for at least a significant number of people and communities. One of the reasons why the commitment outputs must be developed with civil society and public input is to allow people outside the public service to have input into the definition of 'significant' in the model standard.
13. Trust Democracy supports the establishment of a community of practice (CoP), and believes that the commitment should explicitly state that membership of the CoP is open to people working outside the public service, in civil society, academia, and the private sector. Government is short on expertise in this topic – as demonstrated by Te Kawa Mataaho hiring external facilitators for development of this and the previous two NAPs – so its CoP can only be strengthened by including the external experts.
14. However, establishment of a CoP is not sufficient to achieve the desired outcomes of "*lift[ing] the quality of community engagement*". Significant additional measures will be required to improve the government (and communities') practices around public engagement. The commitment should be clear that while delivery of the following may be outside the scope of the commitment, what is within scope is design of the awareness raising, training, principles for revision of departmental strategies, policies and practices. We also recommend including work to implement, monitor, review, adapt and strengthen the CoP. This will create a much stronger and relevant commitment. It appears that the

government has not considered the community engagement recommendations in the IRM Transitional Report on NAP3.<sup>3</sup>

15. Trust Democracy strongly supports calls made by civil society groups during development of the NAP for the commitment to be extended to include co-creation of mandatory minimum standards for government consultation exercises. We were deeply disappointed by Te Kawa Mataaho's claim to ministers that "*it is too early*" to do this. On the contrary, we think it is long overdue to take this basic step towards improving the public service's performance on the low end of the IAP2 Spectrum of Public Participation. It would be a key initiative towards actually strengthening agencies' practices and effectively making life better for people wanting to engage with government. As we wrote to the Public Service Minister on 7 October 2022, other countries have had such minimum standards for 20 years. We also appended examples of what such a standard for public consultation could include. If the government and Te Kawa Mataaho are unwilling to countenance inclusion of this work in this NAP, it raises the important question of why we or other civil society groups should donate any further time and effort to this work. There is little point in a commitment on 'significant' public engagement when government is unwilling to pick the low-hanging fruit of basic standards for public consultation exercises.

### *Commitment 2*

16. Trust Democracy strongly disagrees with the statement in the 'Status Quo' section that, "*The final audience for this work is agencies to support capability development and share lessons learnt*". The OGP membership is not just about the public service but all New Zealanders, including communities, organisations and local government. Given the recommendation in the draft report of the government's own Review into the Future of Local Government for much more local government use of deliberative engagement, and the existence of many other communities interested in deliberative and participatory processes in NZ contexts, including IAP2, surely the 'audience' is much wider? As noted above regarding Commitment 1, this has implications for the creation of a community of practice, and further demonstrates why this must be much broader in membership than government agencies.
17. It is highly likely that at least some, or even all, of the deliberative processes identified for inclusion in this commitment will not be organised by government agencies. It would be unethical and extractive to 'mine' these processes for public service learning only. The commitment should make clear what the public service is prepared to contribute to any public sector/civil society/community alliance. Trust Democracy suggests that Te Kawa Mataaho should, at a minimum, commit to organising and paying for independent process evaluation.
18. The commitment should be strengthened by responding to the civil society request that a multi-stakeholder oversight group be convened to guide the delivery of this commitment. This will be key for milestones 2, 3 and 5.
19. Milestone 3 states that it will "*evaluate the deliberative processes pilot*" (which should be plural, not singular, since the commitment refers to 'at least two examples') to identify the

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<sup>3</sup> New Zealand Transitional Results Report 2018-2021, Open Government Partnership, 2022, page 9.  
<https://www.opengovpartnership.org/wp-content/uploads/2022/03/New-Zealand-Transitional-Results-Report-2018-2021.pdf>

lessons learnt. The commitment must specify that the evaluation will be published, so that the lessons learnt are shared with all.

20. Milestone 5 states that it will “*Identify future projects to use deliberative processes*”. The milestone should be strengthened to state that the projects identified will be published. It also should make clear that Aotearoa’s next NAP will have a commitment based on this work, where the government will either fund deliberative processes, or create a fund open to all organisations (government, local government, community) to support the use of deliberative processes.
21. Trust Democracy believes this commitment is ripe for strengthening during the lifespan of the NAP too, as permitted by the OGP. This could be done by adding a milestone to convene, with interested partner ministries, at least two representative deliberative processes (RDP) on useful but complex issues, and to use the results of these processes to identify what further work needs to be done to adapt such processes to New Zealand circumstances.

### *Commitment 3*

22. Trust Democracy strongly supports this commitment. Coherent, well-funded and well-led action in this area is much needed and has been uncompleted work since the Channel Strategy programme was never completed by the eGovernment Unit at the then State Services Commission.
23. For the vision to be achieved, an ‘open’ approach to implementation will be essential: civil society must co-design this work with government. This would be consistent with the existing government Digital Service Design Standard principles such as Principle 1, “*Identify your users and understand their ongoing needs*” and Principle 7, “*Work in the open*”.<sup>4</sup> We are pleased that the commitment includes establishment of a cross-agency, civil society, and iwi working group. For this working group to succeed, act ethically, and not be extractive, civil society and iwi members of the group must be remunerated for their time, both at meetings and for work done in support of the commitment outside those meetings.
24. Successful implementation will require a dedicated budget and we expect the government to approve a 2023 budget bid by DIA to deliver this commitment, given its late inclusion in the draft NAP. Almost all commitments in previous NAPs have been expected to be successful without additional funding and this cannot be permitted to re-occur here.
25. Trust Democracy suggests that delivery of the commitment is more likely to be successful if work across the interdependent elements is enabled by an approach described by the McKinsey 7S framework: strategy, structure, systems, shared values, skills, staff and style.<sup>5</sup>
26. The commitment could be further strengthened by making an explicit connection to the work the government will have to do to implement the Plain Language Act 2022.

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<sup>4</sup> Digital Service Design Standard, <https://www.digital.govt.nz/standards-and-guidance/digital-service-design-standard/>

<sup>5</sup> See: [https://en.wikipedia.org/wiki/McKinsey\\_7S\\_Framework](https://en.wikipedia.org/wiki/McKinsey_7S_Framework)

#### *Commitment 4*

27. Trust Democracy supports the intent of this commitment. We applaud the formalisation of the Serious Fraud Office's work programme in the NAP. Given the value OGP places on participation and partnership, the NAP needs to indicate how civil society will be involved in its implementation. This programme should not be included if civil society does not have an active role in delivering it.
28. The commitment therefore needs to be strengthened by adding a milestone to create a joint agency, civil society and iwi working group to oversee work on the commitment. This needs to include an explicit reference to the strategy being co-designed with civil society and iwi.
29. The 'Ambition' section of the commitment refers to 'Phase One' of the strategy, and then says "*Future development of the strategy may include business and the private sector*". However, a milestone relating to a 'Phase Two', or the future development of the strategy, is needed. Based on our experience of previous NAPs, this omission is an invitation for the future development work to disappear, without any meaningful accountability. The commitment must be strengthened by adding a milestone to specify co-design of 'Phase Two' of the work to extend the strategy to the private sector, to be completed by the end of 2024.
30. The commitment could be further strengthened by adding a milestone that the strategy's development will be informed by conducting and publishing a post-implementation review of the Protected Disclosures (Protection of Whistleblowers) Act 2022.

#### *Commitment 5*

31. Trust Democracy supports the intent of this commitment. However, given the value that the OGP places on participation and partnership, the commitment needs to indicate how civil society will be involved in implementing it. This should not be an OGP commitment if civil society does not have an active role in delivering it. MBIE's failure to engage with civil society throughout the detailed commitment design stage of this NAP's development (between mid-July and September 2022) indicates an unwillingness to work in partnership with civil society that is contrary to the OGP's ethos and suggests that its prior involvement in NAP development workshops sought to fend off proposals it did not want to undertake. The government should not try to claim OGP credit for work that is not being designed or delivered in ways that not only exclude civil society, but which would have been undertaken regardless of OGP membership. To do so debases the currency of the OGP in Aotearoa.
32. This is already demonstrated by the fact the milestones in the NAP show that work on this commitment (milestone 1, drafting instructions for the legislation) commenced in September 2022, three months before this NAP will become 'live'.
33. Without a new preliminary milestone to establish a joint agency, civil society and iwi working group to oversee work on the commitment, non-public service input to the legislation will be limited to the eventual ability to make a submission to a select committee on the legislation.
34. The milestone timeline needs correction. Milestones 2 and 3 are shown as starting in January 2023, when milestone 2 (drafting the legislation) must occur before milestone 3 (introduce the legislation) can commence. Similarly, since Parliament does not sit in January,

milestone 3 cannot begin then. Milestones 2 and 3 need to be amended so that the end date of milestone 2 is prior to the start of milestone 3, and milestone 2 must begin in at least February 2023, after completion of milestone 1.

35. The commitment is clear that the public will only have access to a limited subset of the beneficial ownership data held by government and available to government agencies. In light of the recent European Court of Justice decision on public access to registers of beneficial ownership in EU member states, this seems prudent.<sup>6</sup> However, the commitment needs to be strengthened by addressing this issue. First, by adding an explicit statement that experience to date shows that government agencies alone do not have the capacity to use all the data available to them in order to achieve the desired anti-corruption and fraud reduction outcomes. Second, by saying that the commitment therefore will explore – with civil society and media input – what minimum data needs to be published as open data to enable these key actors to play their part in investigating issues relating to corruption, fraud and tax evasion. A new milestone to complete this work in time to inform the drafting of the legislation is needed.
36. The commitment would be strengthened by a milestone and deliverable for work to assess the risk posed to corporate governance by the use of trusts, and how to improve the transparency of their ownership and use. To demonstrate some synergy across commitments, government could deliver this piece of work by using a deliberative mini-public to explore the issues (including hearing from expert witnesses) and make recommendations to government for future strengthening of the beneficial ownership legislation.

### *Commitment 6*

37. As with Commitment 5, Trust Democracy supports the intent of this commitment, but the same comments with regard to civil society participation and partnership apply here. (See paragraph 31 above.)
38. The commitment must be strengthened by adding a preliminary milestone to establish a joint agency, civil society and iwi working group to oversee work on the commitment.
39. Milestone one – design changes to the GETS application – must be strengthened to state that the design work will be undertaken with the input of civil society, iwi, media and representative groups from the private sector. See the comments in paragraph 23 above about the Digital Service Design Standard.
40. Milestone two's end date after the end of the NAP lifespan shows that this is a pre-existing work programme that has not been adapted in any way through inclusion in this NAP. The end date for milestone two should therefore be amended to end in December 2024.
41. Milestone two also needs strengthening, to specify that the data gathered by the new 'integrated data system' will be published as open data. We are deeply concerned that the

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<sup>6</sup> *EU Court of Justice decision to "invalidate" transparency in beneficial ownership is a blow to the right to know*, European Federation of Journalists, 25 November 2022. <https://europeanjournalists.org/blog/2022/11/25/eu-court-of-justice-decision-to-invalidate-transparency-in-beneficial-ownership-is-a-blow-to-the-right-to-know/>

'Ambition' section of the commitment says only that the public will have access to procurement information "via a suite of dashboards". Since the commitment says that the data will be collected "in alignment with the Open Contracting Data Standard" the data should be published using this standard. The government will not achieve its desired outcomes in the area of public procurement if it limits the public only to dashboards, which generally visualise data, but not offer it as open data.

42. Milestone three needs to be strengthened by including an undertaking to publish the report on the piloting of the data platform and system.
43. The commitment also needs strengthening by adding a milestone for the joint agency, civil society, iwi, media and private sector representatives to explore adoption of the Open Contracting Global Principles, so that the Government Procurement Rules (and any related legislation) can be amended to require the proactive publication of contract related information such as contracts themselves, reports on performance against the contract specifications, etc.<sup>7</sup> We would prefer the government committed itself in this NAP to adopt the Principles, but if it is unwilling to do this, the very least it could do to demonstrate this commitment being consistent with the OGP ethos is to include a milestone on exploring adoption of the Principles in conjunction with the non-government actors identified above.

#### *Commitment 7*

44. Trust Democracy supports the intent of this commitment. Although it has been included in response to civil society advocacy, it contains no reference to involving civil society in its delivery. Given the value OGP places on participation and partnership, the NAP needs to indicate how civil society will be involved in implementing this commitment. This should not be an OGP commitment if civil society does not have an active role in delivering this commitment.
45. We are also disappointed that the government has not adopted two other key aspects of the civil society recommendation.
46. First, the commitment in the NAP is now weaker than the version that went to Cabinet. That draft included the following statement:

*New legislation is scrutinised for compliance with the New Zealand Bill of Rights Act 1990. However, the Bill of Rights scrutiny does not recognise the Official Information Act 1982 as implementing section 14 of the Bill of Rights Act 1990 and Article 19 of the International Covenant on Civil and Political Rights.*

47. This statement has been removed from the NAP published for consultation, even though it was entirely factually accurate.
48. Trust Democracy wants this commitment strengthened by adding a milestone that the Ministry of Justice will convene a public event, perhaps in conjunction with the Law Commission and a university law school, and with panellists including those nominated by civil society groups, to discuss the amendment of Bill of Rights scrutiny of legislation to

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<sup>7</sup> The Open Contracting Global Principles, <https://www.open-contracting.org/what-is-open-contracting/global-principles/>

include assessment of section 14 compliance when new legislation will override the Official Information Act 1982 or its local government counterpart. We would prefer the commitment to be strengthened to require the government to assess new legislation that overrides the OIA against section 14 of the Bill of Rights Act, but if it is not prepared to go this far, facilitating this event should be the minimum.

49. Second, the commitment should be strengthened by including the other proposal made by civil society, that the government conduct a review of the existing secrecy clauses on the statute books and publish a report detailing which should be repealed and which amended. Failure to include this as a deliverable in the commitment signals that the government is not serious about reducing the official secrecy created over the years (with 20+ such provisions since October 2017 alone), and that by limiting the commitment to revised guidance for prospective legislation, it fully intends that further such secrecy clauses will be enacted in future.

50. This is contrary to the clear intent of the OIA, section 5 of which states:

*The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.*

51. Every time the government relies upon the exception to the principle of availability due to the clause “*where that question arises under this Act*” by enacting secrecy provisions in other legislation, it is actively choosing to weaken the OIA and signalling that it does not trust Parliament’s decision to empower the Ombudsman to make decisions on whether the disclosure of information would be harmful to the public interest.

### **Commitment 8**

52. Trust Democracy supports the intent of this commitment. However, given the value OGP places on participation and partnership, the NAP needs to indicate how civil society will be involved in implementing this commitment. This should not be an OGP commitment if civil society does not have an active role in delivering it.

53. The commitment must be strengthened by adding a preliminary milestone to establish a joint agency, civil society and iwi working group to oversee work on the commitment.

54. The commitment also needs to be strengthened by amending milestone one to specify that the community of practice (or network) will be open to civil society, academics, private sector experts and interested members of the public. If it is not, we question how the Government Statistician would be complying with his statutory duty to foster a culture of open government.

55. The commitment should also be strengthened to mandate adoption of the Charter by all public sector agencies. It is unacceptable that even the low threshold of adopting a weak Charter is optional in 2022, when the government says it is concerned about the use of algorithms and wants to assure the public about their use within government departments and agencies.

56. Finally, the commitment should be strengthened to require government agencies to report on their use of algorithms in their Annual Reports, and be subject to regular external audit.

### Challenge commitments

57. Section 3.4 of the OGP's *National Handbook* sets out details of what the OGP calls 'Challenge Commitments'.<sup>8</sup> Essentially, countries can add up to two further commitments to their Action Plans after their formal adoption.
58. The *Handbook* states that it introduced the idea of Challenge Commitments in 2021 "to enhance flexibility and allow countries that are implementing an action plan to respond to emerging national priorities by using the OGP platform and its participation and co-creation mechanisms".
59. Completion of Aotearoa's fourth NAP has been hampered by the failure of nearly all the relevant government agencies to work with civil society to draft commitments in the period mid-July to early September 2022. This has resulted in the exclusion of commitments that were strongly supported by the participating CSOs, and a weak NAP that once again is full of pre-existing work plans
60. Trust Democracy believes that the government should take advantage of the opportunity presented by the OGP's rules on Challenge Commitments, and add one or two further commitments to the NAP in 2023.
61. Our first choice would be the commitment for civil society and government to co-create the National Interest Analysis of the implications of Aotearoa acceding to the UN's Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the Aarhus Convention.
62. The ability of the public to participate in issues relating to the environment is continually emerging, and we highly doubt the OGP itself would reject Aotearoa proposing to add a commitment on this topic, given the OGP's own research has identified accession to the Aarhus Convention as a key way in which member countries can bolster open government approaches to addressing environmental challenges.<sup>9</sup> Latin American OGP members are already including commitments in their Action Plans to implement aspects of the parallel Escazu Agreement.
63. A second challenge commitment could cover the use of deliberative mini-publics to support the work of select committees when they hold an inquiry into topics of their choice. The timing for such a commitment is propitious, given that the next year will also see the revision of Parliament's Standing Orders.

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<sup>8</sup> *OGP National Handbook: Rules + Guidance for Participants*, Open Government Partnership, 2022. Page 27. <https://www.opengovpartnership.org/documents/ogp-national-handbook-rules-and-guidance-for-participants-2022/>

<sup>9</sup> *Open Government Approaches to Environmental Justice*, Open Government Partnership, 2022. Pages 47-62. <https://www.opengovpartnership.org/documents/justice-policy-series-part-iii-accountability-for-democratic-renewal/>

## Other aspects of the National Action Plan

64. In this section of our response to the draft NAP, we comment on the Plan's introduction, the observations from the Expert Advisory Panel, the section entitled 'Our story' and the section on 'Undertaking the Plan'.
65. Trust Democracy is disappointed that, unlike previous NAPs, there is no foreword from the Minister in this plan nor statement by the Public Service Commissioner. Visibility of ministerial and public service leadership matters.

### *Introduction to the Plan*

66. The very first sentence of the Plan's *Introduction* highlights what appears to be a fundamental misunderstanding about the meaning and value of OGP. The Public Service Commission believes open government is about the Public Service, not the government, not local government, not civil society, not communities, not the public.
67. Similarly, the second paragraph is tone deaf to the history of the OIA in the context of OGP and previous New Zealand NAPs. In spite of a new government being elected in 2017, and the minister responsible for the work to create our Third NAP stating that it would be the most open and transparent government ever, no commitment was included in the NAP to strengthen the Official Information Act. Instead there was a weak commitment to consult on whether a review of the Act was needed. This was done poorly by the Ministry of Justice, which only made the submissions it received public following an OIA request. The poor quality review was then followed by obfuscation about its advice, the new Minister renegeing on the promise by his predecessor to re-write the OIA if Labour was re-elected in 2020, and continuing shortcomings in compliance with the Act despite 'education and reporting initiatives'.<sup>10</sup> The government's refusal to accept that a policy for the proactive disclosure of Cabinet papers is not a substitute for legislated obligations to publish information, nor the strengthening of rights to information that are designed to enable democratic public participation in the design of policies and services. The government's commitment to openness and transparency must be questioned when the commitment in the plan relating to secrecy clauses does not include work to repeal or amend any of these clauses.
68. Instead of trying to claim credit for the 40-year-old OIA and its operation in the *Introduction* to this plan, Trust Democracy recommends that the *Introduction* be centred around the Public Service Act 2020 and its values and principles. The Act is not mentioned until the third paragraph, and even then the text does not mention its values and principles. The Act's requirement for long-term insights briefings is welcome, but the processes for creating them and for stimulating public discussion are inadequate. We note that Te Kawa Mataaho officials themselves declined to run a session with civil society participants in the OGP NAP development process on its own long-term insights briefing (ironically on the subject of public participation). Surely the OGP should be a major part of the Government's programme to give effect to the Public Service Act, and NAP4 should be framed in this way. The failure to do this belies the assurances Trust Democracy and other CSOs received from the Public

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<sup>10</sup> See the Ombudsman's 12 reports on departmental compliance and practice in relation to the OIA, and the overall report 'Ready or Not', published in September 2022.  
<https://www.ombudsman.parliament.nz/news/ombudsmans-oia-probe-uncovers-significant-gaps>

Service Commissioner at their meeting with him in June 2021 that these connections would be made tangible.

69. Trust Democracy also recommends that the *Introduction* includes more context for New Zealand's membership of the OGP. The reasons for NZ joining the OGP in 2013 are missing and this lack of strategic context suggests inadequate government knowledge of both the OGP and the Independent Reporting Mechanism's processes.
70. Trust Democracy recognises that it can be appropriate and desirable for commitments in a new NAP to build on work undertaken under previous NAPs, particularly for long-term ambitious commitments, but the only place where this is made explicit in the *Introduction* is for the engagement toolkit commitment in paragraph 4. The *Introduction* should make the lineage of the other commitments clear – these are not the first commitments on the OIA, or the Algorithm Charter, or on publishing procurement data.
71. Similarly, the *Introduction* should refer to commitments under previous NAPs. Trust Democracy is interested to know what is going to happen to commitments that were not completed (e.g. the creation and maintenance of an authoritative dataset of agencies that was commitment 11 in NAP3), and to know if there have been open government gains from previous commitments. This should explicitly draw upon the comments and recommendations made in the reports of Aotearoa's IRM reviewer, as they are an important part of the context for the new NAP and Aotearoa's progress towards more long-term open government.

#### *Expert Advisory Panel's observations*

72. Trust Democracy is clear that the Public Service Commission's Expert Advisory Panel (EAP) does not meet the OGP's requirements for a genuine Multi-Stakeholder Forum, and we comment further on this issue below.
73. We welcome the Commission's inclusion of the Panel's observations on the NAP creation process in the NAP itself. We believe that the *Introduction* could have picked up on some of the EAP's themes, and included the OGP as a mechanism for addressing some of the democratic and government deficits that have become obvious since COVID-19 arrived in 2020, such as the 2022 protest at Parliament, the extensive increase in inequality resulting from the government's economic response to the pandemic, and a severely-challenged health system.
74. Trust Democracy notes that the EAP "*recommended greater priority be given to the OGP and the authentic co-production of ambitious, potentially transformative commitments*". It is disappointingly clear that, aside from Commitment 3 on multi-channel public services, the commitments in this NAP have not been co-created or co-produced, they are not ambitious and they are unlikely to result in the transformative change that OGP membership aspires to. Although officials in Te Kawa Mataaho worked hard, the staff turnover during the NAP development period – combined with the apparently continuing failures of the department to steward institutional knowledge regarding the OGP – has meant that their work was not productive. It is apparent that after three previous NAPs, the Commission still does not understand the kaupapa and ethos of the OGP, the roles of its Minister and itself in the co-creation process, nor how to ensure other government departments understand and meet

their responsibilities in the co-creation process. Until Te Kawa Mataaho invests in Aotearoa's OGP membership and ensures officials are trained adequately, we fear that this failure will continue, leading CSOs to abandon work on future OGP National Action Plans.

75. We want to be crystal clear so it cannot be spun in any self-assessment or claims to the media or Parliament, that the trust of the civil society organisations involved in the NAP co-creation process has been breached again by the Commission and Commissioner during this NAP creation process and that significant work is needed on its part to rebuild that trust.

### *Our Story*

76. This section begins with a statement that is deeply puzzling:

*The Fourth National Action Plan was developed by the Multi-stakeholder Forum (MSF), consisting of the EAP and officials from the Commission's open government partnership team.*

77. Since this section discusses the involvement of the public and CSOs, we are confused as to whether Te Kawa Mataaho means that the public and CSOs were part of a 'Multi-stakeholder Forum' conforming to the OGP's requirements, or if it is (perhaps unintentionally) being honest about who actually developed the plan.
78. If the former, this is a serious error as neither the EAP nor the arrangements for public and civil society participation in the NAP development process are a multi-stakeholder forum, as documented in the OGP's Independent Reporting Mechanism's reports. If the latter, we think this gives the EAP too much credit, since it is clear that the commitments in the NAP have been determined, with the exception of commitment 3, largely by government departments.
79. Other use of the term 'Multi-stakeholder Forum' or 'MSF' also indicates that the Commission seems to think that the membership of the EAP is comprised of people *representing* various sectors of society, when in fact the EAP's terms of references are clear that people are appointed to it by the Public Service Commissioner for their personal skills and knowledge alone.<sup>11</sup> The appointment criteria make no reference whatsoever to the person needing to be empowered to represent an organisation or sector. They are not representatives of any organisation or sector of society. The terms of reference go on to say that,

*The EAP will be accountable for providing expert advice about OGP National Action Plan development and delivery to the State Services Commissioner.*

80. People appointed in an individual capacity by the Commissioner and who are accountable to the Commissioner can never be described as representatives of anyone else. The Expert Advisory Panel is no more than a panel of people who know about open government, not a Multi-Stakeholder Forum. If the people appointed were stakeholders of a multiple number of sectors, they would be put forward for membership by those sectors, and be accountable to the people who put them forward, not the Commissioner.

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<sup>11</sup> New Zealand Open Government Partnership Expert Advisory Panel Terms of Reference, September 2018. <https://ogp.org.nz/assets/Resources/eap/expert-advisory-panel-terms-of-reference-1.pdf>

81. This section continues with another inaccurate statement:

*Following significant public workshops and engagement with civil society representatives in 2020 and 2021, in October 2021 the Minister for the Public Service identified four key themes for the Plan.*

82. The Minister did not ‘identify’ those themes for the Plan. They were identified by Commission officials following discussion with the EAP and CSOs, and proposed to the Minister in the *joint* report to him of 22 October 2021.<sup>12</sup> All the Minister did is confirm that he found those suggested themes acceptable.

83. Page 8 of the draft NAP, and the timeline on page 9, describes development of the plan with an assertion that the workshops held in April-May 2022 and the two meetings in July 2022 were “public”. This has the potential to be quite misleading for both the OGP and New Zealanders.

84. If the use of the word ‘public’ is only meant to imply there were no restrictions on what attendees could say after the meetings about what took place, this would be accurate, but it is misleading in the context in which these statements are made in the ‘Our Story’ section on development of the NAP.

85. If the word ‘public’ is instead meant to imply that the public were able to participate in these meetings, we point to the fact that no statement made by the Commission made in advance of the workshops and meetings indicated they were open to the public.

86. In its *OGP Update for March 2022*, the Commission stated:

*Developing the next National Action Plan Workshops with our Expert Advisory Panel (EAP), civil society groups (CSOs) and government agencies on the fourth National Action Plan will now start in April.*<sup>13</sup>

87. There is no indication that members of the public could attend the meeting, nor that the meeting would be livestreamed to people who could listen to the discussion but not participate. Similarly limited participation references were made in the 27 April, 17 May, and 23 June updates published by the Commission.<sup>14</sup>

88. A document dated 4 May 2022, distributed by the Commission to CSO participants in the April-May workshops on 26 May 2022, and entitled *Fact sheet: Open Government Partnership New Zealand*, states in regard to the NAP development process:

*NAP4 April-May 2022 workshops with our Expert Advisory Panel, civil society groups, and government agencies are underway.*

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<sup>12</sup> Note recommendation (a) on page 2, which states “Note the advice in this joint report has been developed with the OGP expert advisory panel (EAP), a range of civil society organisations (CSOs) and government agencies”.

<sup>13</sup> *OGP Update for March 2022*, Public Service Commission, 30 March 2022 <https://ogp.org.nz/latest-news/ogp-update-for-march-2022/>

<sup>14</sup> See links to these updates from this page: <https://ogp.org.nz/latest-news/>

89. Similarly, the agenda for both the 6 July and 13 July 2022 meetings, distributed by the Commission on 5 and 12 July, state that the meetings are between:

*Meeting: EAP, CSO and Officials*

90. Trust Democracy strongly urges the government to amend the NAP to correct the statement that the meetings were 'public'. The only public workshops during the NAP development process occurred in 2020 and early 2021, when ideas for commitments were collected at events organised by the Commission.

### **Te Tiriti o Waitangi**

91. We are pleased to see there is a subsection headed 'Te Tiriti o Waitangi' at the foot of page 8. It is important to note that recognition that Te Tiriti o Waitangi had to be addressed in Aotearoa's OGP work came only because of civil society insistence that this issue must be addressed. We are concerned that nine years after Aotearoa New Zealand joined the OGP, the Commission does not have structures, mechanisms or relationships in place for significant Māori involvement in the development of National Action Plans.
92. We were also concerned by the Commission's approach that honouring Te Tiriti obligations in the design and implementation of commitments would only be the responsibility of the departments or agencies that would lead the individual commitments, with no role for the Commission to ensure this happened. This may align with a strict reading of section 15 of the Public Service Act, but the section 14 obligation on the Commissioner and public service chief executives states they have "responsibility for developing and maintaining the capability of the public service to engage with Māori and to understand Māori perspectives". As the person to whom chief executives are accountable, the Commissioner must play a more active leadership role in ensuring commitment lead agencies will honour Te Tiriti obligations in the design and implementation of NAP commitments.
93. We are pleased that each commitment contains a section on Te Tiriti, but note that they include anodyne statements of aspiration and possible outcomes and they do not address key questions such as:
- How can honourable kāwanatanga be applied through the planning and implementation of the NAP4 and OGP commitments (Article 1).
  - How can tino rangatiratanga be enhanced through the commitment (Article 2)
  - How can equality and equity be enhanced particularly for Māori through the commitment (Article 3).
94. This means that commitment lead agencies, immediately after adoption of NAP4, will need to begin the work to develop answers to these questions, in conjunction with Māori, as part of preparing their detailed commitment implementation plans.

### **Undertaking the Plan**

95. This section of the NAP, on pages 29-30 contains three subsections: Implementation, The Multi-stakeholder Forum, and The Independent Reporting Mechanism. We address them in turn.

## Implementation

96. The draft NAP states that:

*Following the publication of the Fourth National Action Plan, the key stakeholders involved in the work under each commitment will continue to work on the implementation process. While the commitments may have milestones and specific outputs, the details of the specific activities required of stakeholders to realise the milestones will typically have more detailed plans.*

97. It is very difficult to see how ‘the key stakeholders’ will be involved in the work, or the development of the detailed plans, given that – aside from commitment 3 – no mention is made in the commitments to the involvement of civil society or other stakeholders in the delivery of the commitment. This includes Te Kawa Mataaho itself, in spite of public participation being the subject of its own Long Term Insights Briefing and its two NAP commitments being on the subject of public participation or ‘community engagement’. As we noted in our introductory comments, the OGP itself is very clear that,

*There are a few options during this phase. Business as usual: government implements, civil society criticizes. Or the version where both sides build a partnership, working together, setting up on-going coordination mechanisms, drawing on each-others expertise. A hybrid, with some organizations on the inside and a few others on the outside undertaking monitoring efforts is the third option.*

98. And that,

*Evidence from IRM reports and OGP’s Decade Report show that continued stakeholder dialogue and participation during the implementation process is strongly correlated with high levels of completion and stronger results.*

99. Unless the commitments in the NAP are revised to specifically require civil society and other stakeholder participation in the delivery of commitments, our experience from previous NAPs is that this will not occur. Aotearoa’s delivery of its Open Government Action Plan will then fall as short of the OGP guidance on delivery as it has on co-creation.

## The Multi-stakeholder Forum

100. The statement on page 29 of the draft NAP which describes what an OGP Multi-stakeholder Forum may be, includes the sentence “*The Multi-Stakeholder Forum (MSF) is an established space for ongoing dialogue and collaboration between government and civil society representatives and leads the open government processes within a country.*” As a statement of the model it is unremarkable.

101. However, the statement on page 30 that “*During the first half of 2023, New Zealand’s current MSF will be leading work on the design and establishment of a new Multi-stakeholder Forum*” is problematic.

102. As should be apparent from previous comments in this submission, the assertion that New Zealand currently has a OGP-compliant MSF is simply untrue. The members of the EAP are not “*civil society representatives*” and they do not “*lead the open government processes*”

within Aotearoa. The people appointed by the Commissioner as individual experts in matters relating to open government are not representatives of civil society as a whole or even any organisation they may lead or be involved with. The EAP is only an advisory group to the Commissioner – not even the Minister – and has no decision-making rights. It cannot “lead the open government processes” in this country.

103. Trust Democracy is confident that if it and the other CSOs involved in the current OGP work are not members of the purported current MSF, none exists.
104. Since honesty is the first step in building trust between potential partners, the government should be honest and state in the NAP that Aotearoa has not had a genuine Multi-stakeholder Forum but intends to develop one in the first half of 2023. Such a statement of intent could be made tangible and explicit if it was turned into an additional NAP commitment. Such honesty on this topic would clearly demonstrate good faith, which will be essential for the design and establishment of a new and compliant Multi-stakeholder Forum.
105. Issues that must be addressed in the creation of a MSF include the following:
  - Identification of the stakeholders
  - How a person may claim to be a representative of any stakeholder or sector of society that has a stake in the OGP work
  - Evaluation of those claims – different sectors may have varying approaches to deciding who may legitimately claim to represent them
  - Obligations on representatives with regard to seeking input from those they represent, and reporting back to them
  - The functions, powers and decision-making rights of the Forum
  - Who chairs the Forum
  - Financial and resource support for the work of the Forum and paying members for their time
106. Development of this and previous NAPs has shown that while ultimate decision-making on the contents of a NAP rests in the hands of Cabinet, officials and ministers have been unclear on the role of the Minister for the Public Service in this process. This has led to failures of leadership, through a lack of participation in the co-creation work, a lack of visibility to other agencies that has led them to believe the OGP work can easily be ignored without consequences, and a lack of providing ideas or a negotiating brief to the officials undertaking the NAP development work on a day-to-day basis.
107. Trust Democracy firmly believes that the MSF must be co-chaired by the Minister for the Public Service and a civil society representative. This would finally give meaningful effect to the word ‘Partnership’ in the title of the OGP. Officials from Te Kawa Mataaho and other government agencies should participate in the MSF as equals with civil society representatives.

108. If the MSF is to have sector representatives (e.g. Māori, civil society and possibly private sector), they must be selected and appointed to the MSF only by the people and organisations they represent. Public servants or the Minister cannot veto who can serve on the MSF.
109. If the government wants the MSF to fulfil the role of ‘leading’ the open government processes in Aotearoa, and to take on the responsibilities described in the boxes on page 30 of the draft NAP, the Forum will be executive, not advisory. Te Kawa Mataaho must provide the secretariat, in the same way that the Ministry for the Environment provided the secretariat to, and supported the work of, the Bioethics Council.
110. In light of the consistently poor experiences of civil society groups over the last nine years of Aotearoa’s membership of the OGP, and for civil society to consider it worth their while to participate in the work again in future, Trust Democracy believes government ministers must show courage and leadership to create a truly empowered MSF. Not only would this move a key international commitment made by governments up the IAP2 Spectrum from the current sub-par ‘consult’ level towards the proper level of ‘empower, but it would enable Te Kawa Mataaho to model expectations for the rest of the Public Service on giving effect to their duty to ‘foster a culture of open government’. From a Te Tiriti o Waitangi perspective, the Crown would also finally be honouring its obligations in the OGP work.

### **The Independent Reporting Mechanism**

111. This section is underdone and should appear towards the start of the NAP, not as the last word. The reason for this is that the NAP should begin by saying how it will be addressing the insights and recommendations from not just the IRM report on the just-completed NAP, but on outstanding issues and recommendations from all previous IRM reports. Accountability documents are pointless unless those they are meant to hold to account show publicly how they will be acting on the lessons learned and recommendations from such documents. For example, this NAP completely fails to address the lack of completion for commitment 11 in NAP3, and how this could be addressed in NAP4.
112. With regard to this commitment, the IRM’s *Transitional Results Report*, released in March 2022, stated that:

*The Department of Internal Affairs has now scoped and identified resourcing required to deliver a two-phased implementation plan beginning in early 2022, involving Build and Release (phase 1) and Maintain and Develop (phase 2). Some of the required resourcing has been committed to Phase 1, with work ongoing to secure the remainder. The department is also working towards identifying a system owner for the dataset.*<sup>15</sup>
113. In spite of this, the Department did not provide any communication to any of the non-government participants in the work on this commitment between 2018 and 2021, and certainly not the ‘two-phased implementation plan’ reported in 2022.

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<sup>15</sup> New Zealand Transitional Results Report 2018-2021, Open Government Partnership, 2022, page 23. <https://www.opengovpartnership.org/wp-content/uploads/2022/03/New-Zealand-Transitional-Results-Report-2018-2021.pdf>

114. This IRM section contains an inaccurate statement that *“A key output of the IRM is the ‘Transitional Results Report’, delivered at the end of the implementation of a National Action Plan.”* First, the Transitional Results Report, as its name signals, was an interim report format as the OGP’s Independent Reporting Mechanism transitioned from an earlier assessment methodology to its current one. Second, the section omits to mention the IRM reviewer will first be producing an *Action Plan Review* that assesses the quality of commitment design and compliance of the process for creating the NAP with the OGP’s Co-creation and Participation Standards. It also fails to mention that after producing the *Results Report* following implementation of the NAP, the IRM researcher will be producing a *Co-Creation Brief* ahead of the co-creation of NAP5 to provide *“an overview of the opportunities and challenges for open government in a country context and presents recommendations drawing on lessons and examples from comparative international experience and previous IRM reports.”* Trust Democracy recommends that since Te Kawa Mataaho appears to have lost the institutional knowledge regarding the IRM work and not be up to date, it should familiarise itself with the timeline and work products of the IRM.<sup>16</sup>
115. This section should not only provide a link to where the IRM reports can be found on the OGP’s website, but to how Dr Eppel can be contacted by those interested in commenting on Aotearoa’s OGP activities.

### Closing Comments

116. After actively participating in what we understood to be a ‘co-creation’ process to develop the NAP, Trust Democracy is not happy that we had to write a 19-page submission to document the many issues in the draft NAP. Many of the issues our submission highlights could, and should, have been worked through before the draft NAP was published for consultation.
117. Trust Democracy hopes that future co-creation processes will be properly planned and resourced so that the work is complete well before deadlines for submitting the NAP to the OGP. It will also be important for the co-creation process to be considered more ‘acceptable’, ‘good’ and satisfying for participants than the process for NAP4.<sup>17</sup>

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<sup>16</sup> These can be found here: <https://www.opengovpartnership.org/irm-products-and-process/>

<sup>17</sup> According to Rowe, Frewer and Marsh in their 2004 paper ‘Evaluation of a Deliberative Conference’, acceptance criteria include representativeness, independence, early involvement, influence and transparency; good process criteria include resource accessibility, task definition, structured decision making and cost-effectiveness.