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12 December 2022

Dear Mr Hipkins,

Draft of Aotearoa'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. The Council's response follows the structure of the draft NAP. However, we also urge the government to take advantage of the OGP's rules on 'challenge commitments' and add the commitment on co-creation of a National Interest Analysis of the Aarhus Convention to the NAP next year.

Introduction to the Plan

3. We are disappointed that, unlike previous NAPs, the draft NAP does not contain a ministerial foreword, as this is a valuable opportunity to signal ownership, leadership and expectations.
4. The very first sentence of the Plan's *Introduction* highlights the Te Kawa Mataaho's fundamental misconception of what the OGP is about. It seems to believe open government is about the Public Service, not the public, communities, civil society, local government, nor even government.
5. The second paragraph boasts about the Official Information Act (OIA) in a way that is oblivious to the history of the OIA in the context of OGP and previous New Zealand NAPs. Successive NAPs have failed to do anything of substance with regard to the OIA. No commitment was included in the third

NAP to strengthen the Official Information Act. Instead there was a weak commitment to consult on whether a review of the Act was needed. We continue to see poor behaviour by agencies and ministers with regard to the OIA despite the Commission's OIA Forum and publication of statistics.¹ The Commission itself has failed to comply with its duty to foster open government, by not seeking requesters' input into the advice it provided earlier in 2022 on an overhaul of the OIA statistics and publication of Cabinet papers. We highlighted the problem of secrecy clauses overriding the OIA in our briefing to you of December 2021. In spite of this, the commitment in this NAP relating to this issue does not include work to repeal or amend any of these clauses. In this context, trying to claim any credit for the OIA and its operation in the *Introduction* to this plan is quite strange.

6. The *Introduction* would be improved by focussing on the Public Service Act 2020 and its values and principles. The text does not even mention these. The Act's requirement for long-term insights briefings is welcome, but the processes for creating them and for stimulating public discussion leave a lot to be desired. For example, we note that Te Kawa Mataaho officials who were developing the Commission's LTIB on public participation refused a request from our Deputy Chair that they run a session with the civil society participants in the OGP NAP development process. This would have been a positive thing to cite in the *Introduction*. The OGP work is a major opportunity for the Government to give effect to the principles and values in the Public Service Act, and the failure to have situated NAP4 in this context undermines the assurances the Council and other CSOs received from the Public Service Commissioner at their meeting with him in June 2021.
7. The 4th NAP is an opportunity to build on commitments in previous NAPs, but the only place where this is made explicit in the *Introduction* is for engagement toolkit commitment in paragraph 4. The *Introduction* should explain the history of the other commitments – these are not the first commitments on the OIA, or the Algorithm Charter, or on publishing procurement data.
8. Likewise, we are disappointed by the failure of the *Introduction* to provide an update on commitments under previous NAPs. The Council believes this context is important and that people will be 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.

¹ Documented by the Ombudsman in his September 2022 reports. <https://www.ombudsman.parliament.nz/news/ombudsmans-oia-probe-uncovers-significant-gaps>

Expert Advisory Panel's observations

9. The Council has repeatedly stated that the Public Service Commission's Expert Advisory Panel (EAP) does not meet the OGP's requirements for a genuine Multi-Stakeholder Forum (MSF), and we comment further on this issue in the section at the end of the plan on establishing an MSF.
10. The Council nevertheless welcomes the government's inclusion of the Advisory Panel's observations on the NAP creation process in the NAP.
11. The Council notes that the EAP "*recommended greater priority be given to the OGP and the authentic co-production of ambitious, potentially transformative commitments*". It is abundantly 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 not transformative. We recognise that officials in Te Kawa Mataaho worked hard, but the turnover in staff during the NAP development period, combined with continuous failures of the department to steward institutional knowledge regarding the OGP, means that their efforts were misguided and have consequently reinforced a tired old trope of government retaining power, and civil society criticising them for it. This is not what the 'partnership' in OGP looks like when you read its guidance.
12. An underlying cause of the issues raised by the EAP is that after four NAP creation processes, it seems the Commission and government as a whole still does not understand the kaupapa and ethos of the OGP. The role you, as lead Minister, should play in the co-creation process does not seem to be understood. Nor is it apparent that the Commission knows how to leverage your and its own authority to ensure other government departments meet their responsibilities in the co-creation process.
13. To address this, Te Kawa Mataaho must invest in its officials, to ensure they are properly trained and have the skills to facilitate co-creation, as well as being adequately resourced to lead the high quality engagement with the public and multiple stakeholder groups that should be excited by the opportunity to get a project on a topic of their interest funded.
14. As the EAP contribution notes, civil society organisations (CSOs) wrote to you in March 2021 to highlight the importance of allocating sufficient funding to commitments. Without the incentive of bidding to be allocated additional funds to deliver commitments, other departments will regard engaging in OGP plans as additional work, with higher risks of public criticism, for no reward.
15. Without leadership and action to change the dynamic and incentives, it seems clear that this consistent record failure will continue, leading CSOs to decide that any work on OGP Action Plans is a waste of time and effort. We have structural weaknesses in civil society in Aotearoa, so any time allocated to OGP efforts comes with a significant opportunity cost. In the course of this NAP creation process, Hui E!, the Public Services Association, Child Poverty Action Group and Amnesty International have all withdrawn. It is apparent

from the drop-off in participation by officials from other government agencies that they too decided the potential benefits were not worth the work required.

16. The government should be under no illusion: civil society's trust in the NAP co-creation process has been breached yet again by the Commission and Commissioner during this NAP creation process and it will have to make major changes and put in serious effort to rebuild that trust.

Our Story

17. This section begins with a statement that is either inadvertently honest about who actually developed NAP4, or is deeply confused about whether the public and CSOs were part of the MSF:

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.

18. If the former, 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, entirely by government departments. If the latter, it is seriously in error as neither the EAP nor the arrangements for public and civil society participation in the NAP development process are a multi-stakeholder forum according to the OGP's Independent Reporting Mechanism's reports.
19. 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 appointed to it by the Public Service Commissioner for their personal skills and knowledge alone.² The appointment criteria make no reference whatsoever in the list of candidates' attributes to the person needing to be empowered to represent an organisation or sector. Therefore EAP members are not representatives of any organisation, let alone a 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.

20. People appointed in an individual capacity by the Commissioner and who are accountable to the Commissioner can in no way be described as representatives of anyone else besides themselves. The Expert Advisory Panel is therefore just that, 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

² 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>

membership by those sectors, and be accountable to the people who put them forward, not the Commissioner.

21. 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.

22. 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 2021.³ All the Minister did is confirm that he found those suggested themes acceptable.

23. 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 both to the OGP and to New Zealanders.

24. 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 misleading in the context in which these statements are made in the ‘Our Story’ section on development of the NAP.

25. If this is meant to imply that the public were able to participate in these meetings it is simply false. No statement made by the Commission made in advance of the workshops and meetings indicated they were open to the public.

26. 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.⁴

27. 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.⁵

³ 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”.

⁴ *OGP Update for March 2022*, Public Service Commission, 30 March 2022 <https://ogp.org.nz/latest-news/ogp-update-for-march-2022/>

⁵ See links to these updates from this page: <https://ogp.org.nz/latest-news/>

28. In 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*, it 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.

29. 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 Meeting*

30. The Council recommends the government 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

31. The Council welcomes the inclusion of a section headed ‘Te Tiriti o Waitangi’. This is welcome. However, recognition that Te Tiriti o Waitangi had to be addressed in Aotearoa’s OGP work only came about because of civil society insistence that this issue must be addressed. We are deeply concerned that nine years after the country joined the OGP, Te Kawa Mataaho does not have structures, mechanisms or relationships in place for significant Māori involvement in the development of National Action Plans.
32. We are also concerned by the Commission’s reluctance to show leadership on this issue. Its approach seems to be that honouring Te Tiriti obligations in the design and implementation of commitments was something that was only the responsibility of the departments or agencies that would lead the individual commitments, and that it had no role to ensure this happened. This may align with the accountabilities set out in section 15 of the Public Service Act, but section 14 places obligations on the Commissioner and says he has “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 can and should play a more active leadership role in ensuring commitment lead agencies honour Te Tiriti obligations in the design and implementation of NAP commitments.
33. The Council welcomes the fact that each commitment contains a section on Te Tiriti, but these are bland statements of aspiration and possible outcomes. 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).
34. This is likely due to the failure of commitment lead agencies to work with CSOs between mid-July and September 2022 to draft the commitments. If the government is to demonstrate that it takes Te Tiriti obligations seriously, lead agencies will have to work with Māori to develop answers to these questions as part of preparing their detailed commitment implementation plans.

Draft Commitments

35. While the Council particularly welcomes commitment three in this Action Plan, overall this draft NAP is the latest in a series of disappointing and unambitious OGP action plans, produced by successive New Zealand governments, that have been filled with programmes of work which were either already taking place or already planned to take place. CSOs' 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 being a member of the OGP. The government spends \$250,000 per year on membership fees for this organisation but does next to nothing to learn from other countries, does not invest in the knowledge and skills to co-create plans with civil society and the public, does not incentivise departments to take part by providing additional funding, and then wonders why it's not getting any rewards or plaudits for the money spent. Neither the government nor the public are getting any serious return on this investment, and the starting point for changing this has to be what you said you wanted in March 2020: a *"much more ambitious plan"*.
36. A number of commitments contain milestones with start dates of January 2023. This is completely unrealistic, as no substantive work begins in the public service until the beginning of February, when everyone has returned from their summer holidays. The start dates should be in February 2023, with the end dates also put back a month, so that the full time period estimated for each milestone is actually available for the work.
37. The Council notes that the NAP does not use the OGP's template for commitments, and reverts to the poor structure of previous NAPs. This is very strange, considering Te Kawa Mataaho was using the OGP template earlier in the process. We note that in September 2022, CSOs provided officials with completed OGP templates for each commitment.
38. The failure to use the OGP's template is contrary to its requirements, and serves Aotearoa poorly. The OGP's change to the commitment templates was made in order to assist members with improving the quality of commitments by requiring greater explanation of the 'theory of change' or 'intervention

logic' for each commitment. This includes a proper problem definition (which is different from the 'status quo' statements in the NAP), analysis of the causes of the problem, a statement of 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 therefore suffered from the government not using the OGP's template. Since Te Kawa Mataaho actually used the OGP template themselves earlier in the process, the shift away from them suggests that they couldn't be completed by commitment lead agencies in the time available. Running out of time in spite of being given an additional year to develop the plan is not satisfactory.

39. 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 other stakeholders). The claim that agencies are not resourced for this is both an unacceptable failure to comply with the statutory duty to foster a culture of open government and indicates profound ignorance of what the OGP is about, 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.⁶

40. 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.⁷

41. The Council is deeply disappointed that the government has, yet again, opted for what the OGP describes as 'business as usual': with government implementing and civil society criticising. For an agency that continually talks about the 'Spirit of Service' and boasts about levels of public trust in the

⁶ *Action Plan Cycle*, Open Government Partnership. <https://www.opengovpartnership.org/process/action-plan-cycle/>

⁷ *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/>

public service Te Kawa Mataaho has a strange way of trying to serve the public and strengthen levels of trust.

Commitment 1 – Community engagement tool

42. The Council agrees 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 milestone. However, we are worried 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 means the Commission itself is failing 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. To see this abandoned calls into question whether the Commission has been acting in good faith.
43. The Council 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 section 12 public service principles. 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.
44. 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, as experience with previous NAP commitments indicates that unless this is stated explicitly we cannot rely on this happening.
45. The draft commitment states that the PCET will be required for community engagement on 'significant initiatives'. What 'significant' means is undefined, which is problematic. Aside from decisions on individual cases, government policies and decisions are nearly always significant for 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 so that people outside the public service have input into the definition of 'significant' in the model standard.
46. We support the re-establishment of a community of practice (CoP) – the State Services Commission previously facilitated one until 2008 – and believe 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 departments are clearly short on expertise and

skills regarding this key issue – 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 external experts.

47. The 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 strengthened by adding in design of the awareness raising, training, principles for revision of departmental strategies, policies and practices.
48. The Council 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. Since the UK had an all-of-government Code of Practice on public consultation more than 20 years ago, we were shocked by Te Kawa Mataaho’s claim to ministers that *“it is too early”* to do this. On the contrary, it is long overdue. The *Introduction* to the NAP talks about lifting the quality and consistency of community engagement. To do so, co-design and adoption of minimum standards on consultation exercises is a vital basic step towards improving the public service’s performance on the low end of the IAP2 Spectrum of Public Participation. Inclusion of a milestone and deliverable on this issue would be a key initiative to actually strengthen agencies’ practices – which would benefit them and members of the public – which is the intent of the OGP, after all.
49. In our joint letter to you of 7 October 2022, we also appended examples of what such a standard for public consultation could include. The government says it wants to move its engagement practices up the IAP2 Spectrum of Public Participation. But if it is unwilling to strengthen practices at the lower end of the spectrum, why should anyone have confidence that its work at the upper end of the spectrum will be high quality. Time and effort must be dedicated to laying solid foundations first.

Commitment 2 – Research deliberative processes

50. The Council finds bizarre the statement in the ‘Status Quo’ section that, *“The final audience for this work is agencies to support capability development and share lessons learnt”*. It shows, yet again, a profound misunderstanding of the OGP, which is not just about the public service but all New Zealanders, including communities, organisations and local government. The ‘audience’ is clearly much broader. As noted above regarding Commitment 1, this has implications for the creation of a community of practice, and further demonstrates why this must have much more inclusive membership criteria than government officials.
51. In view of the underfunding of NAP commitments, it is clear that the deliberative processes identified for this commitment will not be organised by government agencies. ‘Mining’ these deliberative exercises solely for the government’s education would be extractive and therefore unethical. The

commitment should therefore make clear what the public service is prepared to contribute to any public sector/civil society/community work that is undertaking a deliberative exercise. At the very least, Te Kawa Mataaho should commit to paying for independent process evaluation that is then published.

52. 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.
53. Milestone 3 states that it will “*evaluate the deliberative processes pilot*” (which, since the commitment refers to ‘at least two examples’, should be plural, not singular) to identify the lessons learnt. The commitment must specify that the evaluation will be published, so that the lessons learnt are shared with all.
54. Milestone 5 states that it will “*Identify future projects to use deliberative processes*”. The milestone should be strengthened to state that work will be done to design a fund open to all organisations (government, local government, community) to support the use of deliberative processes.
55. The fact that the commitment is only about researching deliberative practices being used by others, and not the establishment by government of projects that will use them, is another indication of what happens when government does not act on CSOs’ calls for money to be put aside to fund OGP commitments.

Commitment 3 – Multi-channel public services

56. The Council strongly supports this commitment. We have for some time been concerned about equitable access to public services by those who choose not to use digital channels, as well as those who are excluded for economic or accessibility reasons. Coherent, well-funded work is critical.
57. We are pleased that this commitment at least includes establishment of a cross-agency, civil society, and iwi working group. For this working group to succeed, civil society and iwi members of the group must be paid for their time, both at meetings and for work done in support of the commitment outside those meetings. To deliver this commitment, an ‘open’ approach to implementation will be essential. 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*”.⁸
58. Crucially, successful implementation will depend upon adequate funding for the work. We have seen too many commitments in previous NAPs lack in ambition, or fail to be delivered, due to the absence of additional funding

⁸ Digital Service Design Standard, <https://www.digital.govt.nz/standards-and-guidance/digital-service-design-standard/>

being allocated specifically for work on the commitment. This cannot be permitted to re-occur here. We expect the government to both invite and approve a budget bid by DIA to deliver this commitment.

Commitment 4 – National Counter Fraud and Corruption Strategy

59. The Council supports the intent of this commitment, but we see no indication of civil society participation in implementing it. Unless the commitment is amended to include CSO and other stakeholder participation, this should not be an OGP commitment.
60. The commitment is confusingly worded. 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*”. The commitment needs to have a milestone relating to a ‘Phase Two’ for this future development of the strategy.
61. The Council hopes that Te Kawa Mataaho will be commissioning and publishing a post-implementation review of the Protected Disclosures (Protection of Whistleblowers) Act 2022. The commitment could be further strengthened by making an explicit connection between development of the strategy and learning from this review.

Commitment 5 – Beneficial ownership

62. Again, the Council supports the intent of this commitment, but again it does not belong in the NAP if civil society does not have an active role in delivering this commitment. MBIE’s complete failure to engage with civil society during 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 antithetical to the OGP’s ethos. It seems clear now that MBIE’s involvement in NAP4 workshops prior to mid-July 2022 was entirely defensive, to fend off proposals it did not already 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 will foster further scepticism (if not cynicism) about the OGP, when Aotearoa’s membership is already regarded by many as an ‘openwashing’ exercise.
63. The pre-existing nature of the project in this commitment is demonstrated by the milestones in the NAP showing that work on this commitment (milestone 1, drafting instructions for the legislation) commenced in September 2022, three months before this NAP will become ‘live’.
64. Unless the commitment is strengthened to ensure CSO and other stakeholder oversight of its delivery, 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. This is neither fostering a culture of open government, nor moving public service engagement with stakeholders up the IAP2 Spectrum.

65. Milestones 2 and 3 are both bizarrely shown as starting in January 2023. Since milestone 2 (drafting the legislation) must occur before milestone 3 (introduce the legislation) can commence, this needs to be fixed. Similarly, since Parliament does not sit in January, there is no way in which milestone 3 can begin then.
66. Access to information about beneficial owners is, like all access to official information, an exercise in weighing competing public interests. In this case, the privacy of owners against the public interest in being able to establish control over companies and partnerships to ensure compliance with laws. The MBIE work programme and commitment address the need to weigh these interests by stating that the public will only have access to a limited subset of the beneficial ownership data held by government and available to government agencies.
67. The European Court of Justice decision of 22 November 2022 on public access to registers of beneficial ownership in EU member states is that full public access was not an infringement on owners' privacy that had been adequately justified.⁹ This indicates that the government's approach to this may be prudent.
68. However, there has been considerable CSO and media disquiet with the ECJ's decision, since cutting off public access to the registers of beneficial owners means that they can no longer effectively investigate issues such as fraud, corruption and tax evasion. The commitment in the NAP 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 is the minimum data needing 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. This second statement needs to be reflected by adding a milestone for this work, which must be completed in time to inform the drafting of the legislation.
69. The government has demonstrated, in the Data and Statistics Act 2022, that it is willing and able to invest in building a system for deciding on researchers' applications to access the data held by Statistics NZ. Accordingly, this commitment should be strengthened to state that the legislative design stage will explore, with CSOs and the media, how such a mechanism for access to beneficial ownership data can be done in ways that enable connections to be made with other datasets (necessary to trace connections and actions that

⁹ *Anti-money-laundering directive: the provision whereby the information on the beneficial ownership of companies incorporated within the territory of the Member States is accessible in all cases to any member of the general public is invalid.* European Court of Justice media release, 22 November 2022. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-11/cp220188en.pdf>

may be unlawful). A process for applying to access the data must also have an independent complaints mechanism that can overturn decisions to refuse access.

70. The Council also supports Transparency International NZ's view that the commitment should be strengthened by having 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.

Commitment 6 – Procurement information and data

71. Again, the Council supports the intent of this commitment – we proposed a commitment on this topic in our submission of 28 July 2021 – but given the value OGP places on participation and partnership, the NAP needs to be strengthened by requiring CSO, iwi, and other stakeholder involvement in implementing it. Again, we must point out that MBIE deliberately failed to work with civil society on the detailed drafting of this commitment in the mid-July to early September 2022 period.
72. 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. This goes back to compliance with the government's Digital Service Design Standards on including users in the design of tools and services, as well as with the Public Service Act principle on open government.
73. Milestone two shows that this is a pre-existing work programme that has not been adapted in any way through inclusion in this NAP, because it has an end date after the end of the NAP lifespan. Failure to complete the work specified in milestone two by December 2024 will impact the ability of the OGP's Independent Reporting Mechanism to assess delivery of the commitment. The end date for milestone two should therefore be amended to end in December 2024.
74. Milestone two also needs substantial strengthening, to specify that the data gathered by the new 'integrated data system' will be published as open data. It is unacceptable that the '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 regarding improved quality and value for money from public procurement if it limits the public only to dashboards, which are typically about visualising data, not publishing open data for re-use by others.
75. Milestone three needs to be strengthened in two ways. First by committing to pilot the system not just within the NZ Government Procurement team, but with a government department or agency outside MBIE. Second, by inclusion of an undertaking to publish the report on the piloting of the data platform and system.

76. Achievement of the government's desired outcomes would also be made more likely if the commitment were strengthened by requiring proactive publication of contracts and related documents, in line with the Open Contracting Global Principles.¹⁰ This would align well with the government's policy on proactive release of Cabinet papers and OIA responses. However, this policy needs to be underpinned by amending the Government Procurement Rules and any related legislation. Fundamentally, the government needs to embrace the principle that 'openness is the price of winning business from the public sector'.
77. If the government is not ambitious enough to do this immediately, the commitment could be strengthened by adding a milestone for the joint agency, civil society, iwi, media and private sector representatives to explore the issues involved in adoption of the Open Contracting Global Principles.

Commitment 7 – Secrecy clauses

78. The Council briefed you in December 2021 on the long-standing problem of successive governments introducing laws containing provisions that override the OIA. Such clauses are contrary to the clear intent of Parliament in enacting 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.

79. Every time the government relies upon the exception to the principle of availability, due to the phrase "*where that question arises under this Act*", by enacting secrecy provisions in other legislation, it is actively choosing to weaken the OIA. Crucially, it is also 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.
80. While the Council is pleased that there is a commitment relating to this issue, it is also deeply disappointed by the weakness of the commitment.
81. Not only is there no reference to involving civil society in its delivery, but it does not include the other two key aspects of the civil society recommendation to you.
82. First, the commitment in the draft NAP is now weaker than the version that was circulated to us in advance of Cabinet considering it. The draft provided to us included the following statement:

¹⁰ The Open Contracting Global Principles, <https://www.open-contracting.org/what-is-open-contracting/global-principles/>

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.

83. This statement has been removed from the NAP published for consultation, even though it was entirely factually accurate.
84. The Council wants this commitment strengthened. We would prefer this to be done by simply including a statement that the government will assess new legislation that overrides the OIA against section 14 of the Bill of Rights Act. If it is not prepared to take this basic step to comply with international interpretation of Article 19 of the International Covenant on Civil and Political Rights, then a milestone should be added to the commitment. This should specify 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 include assessment of section 14 compliance when new legislation will override the Official Information Act 1982 or its local government counterpart. The Ministry will produce and publish a report on the event and develop a joint submission to the Minister of Justice on the next steps.
85. 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 book and publish a report on which should be repealed and which amended. Failure to include this as a deliverable in the commitment signals not only that the government is not serious about reducing the official secrecy created over the years (with 20+ such provisions since October 2017 alone), but that by limiting the commitment to revised guidance for prospective legislation, it fully intends that further such secrecy clauses will be enacted in future. Is this really the signal that the government wants to send with its 4th OGP Action Plan?

Commitment 8 – Algorithm Charter

86. Yet again, the Council supports the intent of this commitment, but it needs amending 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 overseeing delivery of it.
87. The commitment must therefore be strengthened by adding a preliminary milestone to establish a joint agency, civil society and Māori working group to oversee work on the commitment. Failure to create such a working group that includes Māori would seem to be a prima facie breach of sections 14 and 15 of the Data and Statistics Act, to accompany a failure to comply with the duty to foster open government.

88. The commitment also needs to be strengthened by amending milestone one to specify that the community of practice (or network) that will be created will include civil society, academics, private sector experts and interested members of the public.
89. The commitment should also be strengthened to make adoption of the Charter by all public sector agencies mandatory. The Council has long stated that the Charter is already too weak and that legislation is needed. It is quite unacceptable that even the low threshold of adopting a weak Charter is optional, at a time when the government says it is concerned about the use of algorithms and wanting to assure the public about their use within government departments and agencies.
90. Paragraph one of the 'Status Quo' section emphasises the independent review of the Algorithm Charter's first year of operation. In doing so it attempts to conceal that the Charter is several years old, and that a second and, just marginally, a third annual independent review should have been published by now. The Commitment should be strengthened by adding a new milestone for annual independent reviews of every agency's implementation of Algorithm Charter, and the degree of success that implementation has had on achieving the OGP Principles.
91. Paragraph two of the 'Status Quo' section claims a number of benefits for the Algorithm Charter: risk management policies, ethics committees, and stocktakes, amongst others. The Council notes that these benefits are not supported by the IRM, and therefore finds their assertion here to be suspect. The further claim that agencies have "been transparent with the public about the types of algorithms that are being used" is simply untrue. The Council believes that the reason that the IRM failed to substantiate the benefits claimed in paragraph two, is that the implementation of the algorithm charter is being performed behind a curtain of secrecy. The Council agrees with the IRM's assessment that a tiny handful of agencies have published a mere hint of information.
92. The commitment should be strengthened by adding a new milestone for every agency to make their algorithm risk management policies publicly available, and to keep them updated.
93. The commitment should be strengthened by adding a new milestone for every agency to establish an ethics committee to oversee algorithms. Each of those committees should include academic, iwi, and CSO representatives in addition to all of government experts from, for example, Statistics New Zealand. The membership of these committees, their decisions, and the minutes of their meetings should also be publicly available.
94. The commitment should be strengthened by adding a new milestone for government agencies to report on their use of algorithms in their Annual Reports.

95. The commitment should be strengthened by adding a milestone for government agencies to commission external audits of existing algorithms. Proposed new algorithms should also be externally audited before they are used. A schedule of annual audits should be established to establish public trust that the algorithms in use are the algorithms which were approved. All of these reports should be publicly available, with the pre-commissioning report for new algorithms published at least 30 working days before their first use.
96. Finally, the commitment should be strengthened by adding a new milestone for the lead agency, Statistics New Zealand, to conduct pre-implementation consultations for new algorithms, to commission an independent review of those consultations, and to prepare tools, guidance, and other supports so that other agencies are ready to commit to pre-implementation consultations in the next NAP.

Challenge commitments

97. Section 3.4 of the OGP's *National Handbook* sets out details of what the OGP calls 'Challenge Commitments'.¹¹ These enable countries to add one or two further commitments to their Action Plans after their formal adoption.
98. Challenge Commitments were introduced by the OGP 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"*.
99. Finalisation of Aotearoa's fourth NAP has been impeded by the failure of nearly all of the relevant government agencies to work with CSOs to draft the commitments between mid-July and early September 2022. The Ministry for the Environment did not speak to us at all before providing inaccurate advice that rejected even the idea of exploring the implications of accession to the Aarhus Convention.
100. The Council therefore believes that the government should take advantage of the opportunity presented by Challenge Commitments, and add one or two further commitments to the NAP in 2023.
101. 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.
102. Environmental issues are 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

¹¹ *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/>

Convention as a key way in which member countries can bolster open government approaches to addressing environmental challenges.¹² Latin American OGP members are already including commitments in their Action Plans to implement aspects of the parallel Escazu Agreement.

103. A second challenge commitment could adopt the Council's recommendation that a review be undertaken of the confidentiality terms imposed on external experts who serve on expert advisory groups across government. This was suggestion 8 in our submission of 28 July 2021. This issue continually affects the ability of CSOs who participate in government policy development work. Such confidentiality terms are, in our view neither necessary nor justified infringements on CSOs' freedom of expression rights, supposedly guaranteed under section 14 of the NZ Bill of Rights Act. Instead, they are designed to enable public servants to keep all the power in a policy development process. This is a clear open government issue, and one that is long overdue for the government to tackle.

Undertaking the Plan

104. The final section of the NAP contains three subsections: Implementation, The Multi-stakeholder Forum, and The Independent Reporting Mechanism. These are addressed below.

Implementation

105. 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.

106. As the Council has noted throughout this response to the draft NAP, 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. Shockingly, this includes Te Kawa Mataaho itself, in spite of public participation being the subject of its own Long Term Insights Briefing and the two commitments it will lead being on the subject of public participation or 'community engagement'. As noted in our introductory comments, the OGP itself is very clear that governments can opt for 'Business as usual: government implements, civil society criticises', or it can invest in building a genuine partnership by setting up on-going coordination mechanisms to draw on each other's expertise.

¹² *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/>

107. The OGP now has 10 years of experience and data on the implementation of National Action Plans. It states 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.

108. The Council's experience of previous NAPs is that unless the commitments in the NAP are revised to specifically require civil society and other stakeholder participation in the delivery of commitments, 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

109. Statements made on page 29 of the draft NAP describe what a Multi-stakeholder Forum may be in the context of the OGP. It includes the sentence *"The Multi-Stakeholder Forum (MSF) is an established space for ongoing dialogue and collaboration between government and civil society representatives and lead the open government processes within a country."* As a statement of the model it is unremarkable.
110. What is really problematic is 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."*
111. 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, nor even of any organisation they may lead or be involved with. Further, the EAP is only an advisory group and has no decision-making rights, so it cannot *"lead the open government processes"* in this country.
112. The Council is confident that if it and the other CSOs involved in the OGP work are not members of the purported current MSF, none exists.
113. Honesty is the first step in building trust between potential partners, so the government should simply be honest and state in the NAP that Aotearoa has not, up until now, had a genuine Multi-stakeholder Forum. A lack of honesty on this topic does not demonstrate good faith, which will be essential for the design and establishment of a Multi-stakeholder Forum.
114. 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
115. 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 the 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 provision of ideas or negotiating brief to the officials undertaking the NAP development work on a day-to-day basis.
116. The Council firmly believes that the MSF must therefore 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.
117. Officials from the Commission and other government agencies should participate on the MSF as equals with civil society representatives, but this does not mean there should be an equal number of public servants who are members of the MSF as there are non-government members. Just as society is made up of greater number of people who are not public servants, the membership of the MSF should reflect this.
118. Māori, civil society and any private sector representatives on the MSF must be selected and appointed to the MSF only by the people and organisations they represent. There can be no question of public servants or the Minister vetoing who can serve on the MSF.
119. 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, it is clear that the Forum will not be advisory, but executive. Te Kawa Mataaho’s role should be to provide the secretariat.
120. Civil society has had consistently poor experiences over the last nine years of Aotearoa’s membership of the OGP. If the government wants this membership to continue, and to have any meaning, the Council believes government ministers must have the courage to show leadership and require the creation of a truly empowered MSF.
121. The Council believes this is an essential action if civil society are to consider it worth their while to participate in the work again in future. 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 show Te Kawa Mataaho modelling expectations for the rest of the Public Service on giving effect to the 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. It would also be able to point to this when assessments are made of Aotearoa's progress on Sustainable Development Goal 16.7.

The Independent Reporting Mechanism

122. This section is weak. The Council believes that the shift in IRM products to include a *Co-creation Brief* being provided to government and civil society in advance of NAP development means that instead of only viewing the IRM as an accountability exercise that comes at the end of a NAP, this section should appear towards the start of the NAP.
123. This would also frame the update that the NAP should begin with, explaining how it will be addressing the insights and recommendations from not just the IRM report on the just-completed NAP, but on outstanding issues from all previous IRM reports. 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.
124. With regard to NAP3 commitment 11, the IRM's March 2022 *Transitional Results Report* 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.*¹³
125. In spite of this, the Department of Internal Affairs has not communicated any information on progress to any of the non-government participants who voluntarily worked on implementation of this commitment between 2018 and 2021, and certainly not the 'two-phased implementation plan'. This is not good enough.
126. The 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." This highlights the loss of institutional knowledge about the OGP within Te Kawa Mataaho. First, the Transitional Results Report, as its name indicates, was an interim report format as the OGP's

¹³ 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>

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 standards. Finally, it also fails to mention that the IRM researcher will be producing a *Co-Creation Brief* ahead of the start of work on 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.*"¹⁴

127. This section should not only provide a link to where the IRM reports on Aotearoa's performance as a member of the OGP can be found on the OGP's website, but also to how the new IRM researcher, Dr Eppel, can be contacted by those interested in commenting on Aotearoa's OGP process and activities.

Conclusion

128. The Council, which has no paid staff, has actively participated in what we thought would be a 'co-creation' process to develop NAP4. We have donated hundreds of hours of volunteer time to trying to help the government comply with its OGP membership obligations. We have done so not for the sake of compliance, but so that the beneficial outcomes of compliance with the OGP's co-creation and participation standards could be realised, through commitments that are better designed and more ambitious because they were drafted together with CSOs and other stakeholders.
129. Many of the issues our submission highlights could and should have been worked through far earlier in the NAP development process. If the co-creation standards had been adhered to, we would not find ourselves in this tired old situation of attributing accountability for processes gone wrong, because higher quality participation would have resolved the issues earlier.
130. Some suggestions for the future, without which we may well not participate again:
- Create an MSF that has executive authority to lead NAP co-creation and oversee implementation (as detailed above);
 - Create an 'OGP commitment fund' in advance of the NAP development cycle, of between \$5-10 million, so departments are incentivised to participate instead of seeing it as a risk of being saddled with unfunded work; and
 - Put systems in place to safeguard institutional knowledge of the OGP, and to actively learn from other countries' experiences of the OGP.

¹⁴ These can be found here: <https://www.opengovpartnership.org/irm-products-and-process/>