

Hon Chris Hipkins MP  
Minister for the Public Service  
Parliamentary Buildings  
WELLINGTON 6160

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

7 October 2022

Tēnā koe Minister Hipkins,

### **Open Government – Consulting Ministers on the 4<sup>th</sup> National Action Plan**

Thank you for meeting with civil society organisations to co-create the commitments in the next Open Government National Action Plan (NAP 4). It was a helpful discussion and we look forward to the opportunity to provide further input before the draft Action Plan goes to Cabinet.

We thought it would be helpful for your consultation with Ministerial colleagues to supplement some of the points made during the meeting, as trying to cover 11 draft commitments in 45 minutes meant some received less attention than others.

### **Te Tiriti o Waitangi**

In the meeting we highlighted the importance of the Action Plan commitments being designed and delivered in a way that honours Te Tiriti o Waitangi (the language of section 9 of the Education and Training Act 2020). We understand there are many demands on officials who have skills in this area, but you will be aware that section 14(2) of the Public Service Act 2020 places a ‘responsibility’ on the Public Service Commissioner and departmental Chief Executives to support the Crown in its relationships with Māori by *“developing and maintaining the capability of the public service to engage with Māori and to understand Māori perspectives”*.

We are confident that officials using the guidance found in Cabinet Office Circular 19(5) and the guidance on engagement from Te Arawhiti that it links to, will – in conjunction with the policy development framework that Te Puni Kōkiri shared with us – assist with this work if agencies genuinely commit to this mahi. That will require strong ministerial communication of expectations on this issue to ensure that Aotearoa New Zealand’s unique constitutional arrangements can be a highlight of our OGP work. It might also help other member countries to navigate relations between the state and indigenous people. Addressing Te Tiriti obligations in the Action Plan’s preface is one way you can communicate expectations to agencies, officials and others.

### **Involving Civil Society in Managing the Delivery of Commitments**

One of the issues apparently causing concern to agencies with the draft commitments provided by civil society organisations are the references to joint working groups to assist in the implementation of the delivery of Action Plan commitments. Normative reasons for involving civil society in the oversight and management of commitments include that it gives effect to the OGP’s value of public participation and the Public Service Act’s duty to ‘foster a culture of open government’ and the OIA’s 40 year old purpose of enabling public participation in the making and administration of laws and policies. One practical reason for doing so is because, as we wrote in our letter of 30 September, the OGP should showcase ways to transform the ‘how’ of government. It seems counterintuitive to have commitments on strengthening community engagement and public participation if that ethos comes to a juddering halt once a policy or service has reached a certain stage. Previous Action Plans have been very patchy on involving the public and civil society in delivery of them, but where

we have been involved, it has led to improvements through increased understanding on the part of all involved in the needs of users and the challenges facing agencies.

This is why we believe it is important that for each commitment agencies need to plan and deliver the work in conjunction with a variety of interested parties outside government. In all cases tangata whenua need to be involved.

Resourcing this involvement will be essential. As we explained in the meeting, there are structural underfunding issues for civil society in Aotearoa. We have a high GDP per capita that means that many international donors exclude us from their list of eligible recipients, a small population, and not much domestic philanthropy. This issue is particularly acute in areas concerning democracy, integrity, civil liberties, privacy, environment and other matters closely related to the topics usually making up OGP commitments. A number of organisations have already dropped out of the Action Plan co-creation process either because they could not justify diversion of scarce funding to work on the Plan, or because they have no funding at all and volunteers could not give up their paid work to participate. Some departments already fund civil society participation in advisory work, such as Te Kawa Mataaho's own Expert Advisory Panel on open government. It would not only be reasonable, but cost-effective in terms of producing better outcomes from the commitments, if civil society and/or public participation in commitment delivery were properly resourced.

During delivery of previous Action Plans we have found a low awareness of the OGP and the international significance of NZ's performance against its standards. We suggest that you and Te Kawa Mataaho provide induction sessions on the OGP and the implications of its values for how commitments are delivered, to Ministers and those officials in government agencies leading commitments. Our experience is that this induction has not been provided, which accounts for some of the reluctance to engage by some agencies. If awareness is delivered by you and the department with overall responsibility for government obligations as a Partnership member, engagement might improve.

### **Draft Commitment 1 – Improving the level and quality of community engagement**

We would like to see the quality of public engagement by government agencies move up the IAP2 spectrum of public participation from the less empowering 'consultation' end of the spectrum to the 'collaborate' and 'empower' end of it. The proposed commitment can assist with that. But, as we discussed in our meeting, there is a clear need to lift the quality of engagement even at the less ambitious 'consultation' level. We see no need to delay work on developing mandatory standards for government consultation exercises. Not only have comparable countries had such standards for decades, but ideas on developing this were shared with a State Services Commission workshop on public participation as long ago as 2007. We have **appended** the 2001 and 2008 editions of the UK Civil Service Code of Practice on consultation for your reference. It is clearly feasible to co-design such mandatory standards for consultation, modified to include provisions to honour Te Tiriti o Waitangi, in a timeframe that would enable the Cabinet to adopt the new standards before the next general election. We mentioned some basic features for inclusion in the standards in our meeting, and these are listed in **Appendix 1**.

### **Draft Commitment 2 – Innovative public participation in policy design and decision making**

It is both valuable and practical for Te Kawa Mataaho to make clear to those departments who will lead the citizens assemblies (or other deliberative mini-publics) that there is a clear expectation that the work to design and deliver these activities will be jointly led by the department and relevant civil society organisations. The key point about these participation tools is that they need to build in legitimacy and expectations of adopting the recommendations from the start. As such, it is reasonable to expect that agencies will 'walk the talk' on public participation in the design and delivery of these deliberation events.

### **Draft Commitment 3 – Access to services and support for all**

This commitment is an opportunity to progress the joined-up approach to government services envisaged in the Public Service Act 2020. Digitisation of government services has been happening without an integrated public services delivery strategy that ensures complementary channels are available. Individual agencies, and project groups within agencies, are responding in an ad hoc, siloed manner. This is neither effective nor efficient public service delivery.

A system-wide response is needed, that moves us beyond the ‘paper-based local directory for older people’ you mentioned during our meeting. This is not merely an older person’s issue or a digital inclusion issue, it is a public service issue that goes to the heart of open government. It is not only about meeting the needs of those who cannot or choose not to interact online by providing ‘good public service’ where there are integrated pathways for moving between channels, but also about building resilience for the range of threats government infrastructure is vulnerable to. On this latter point, we refer you to the OECD ‘[Government at a Glance 2021](#)’ report where governments are advised that they must maintain multiple coherent service delivery channels, such as digital, in-person and telephone as a key aspect of resilience.<sup>1</sup>

We ask that, as Minister for the Public Service, you ensure this commitment is taken up as a whole-of-government issue, through a system leader approach and / or with Te Kawa Mataaho as the lead agency.

### **Draft Commitment 5 – Addressing secrecy clauses**

You acknowledged in the meeting that while the government has put effort into strengthening agencies’ OIA practices and proactive publication, it has not delivered an independent review of the OIA, let alone the ‘rewrite’ promised by the then Minister of Justice two years ago. The government has a significant opportunity to make progress with reducing unnecessary secrecy in government by ensuring this commitment does include a funded work programme to undertake a comprehensive review of all the secrecy clauses littering the statute books. This needs to be run in an open and inclusive manner, so that where recommendations may be made to only amend a secrecy clause instead of repealing it, this is subject to comment from those outside government. It would be paradoxical if, after two terms of a government committed to greater openness, we have a situation where there are significantly more secrecy clauses on the statute book than when it came into office.

We also noted at the meeting that a commitment had been proposed for a review of the practice that many agencies (especially Fisheries NZ and the Ministry for the Environment,<sup>2</sup> to our knowledge) have, of imposing gagging clauses on those who participate in research working groups or advisory panels as a condition of participation. This agency-driven secrecy means that even when there is vital information revealed by research, civil society participants are not allowed to bring it into the policy and practice discussions, even when critical decisions are in the process of being made. A government committed to active citizenship and fostering a culture of open government should be anxious to restrict practices that stifle informed public participation. We suggest either adding work on this to the commitment on secrecy clauses, or having a separate commitment in NAP4 on this topic.

### **Draft Commitment 6 – Aarhus Convention**

In relation to the commitment to co-create a National Interest Analysis of accession to the Aarhus Convention, we made clear in the meeting that work on this commitment could be scheduled to start after the Ministry for the Environment (the likely lead agency) has completed

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<sup>1</sup> See in particular Chapter 1, ‘Fit for the future: Strengthening government resilience’ [https://www.oecd-ilibrary.org/sites/1c258f55-en/1/3/1/index.html?itemId=/content/publication/1c258f55-en&\\_csp=10e9de108c3f715b68f26e07d4821567&itemIGO=oced&itemContentType=book#sect-28](https://www.oecd-ilibrary.org/sites/1c258f55-en/1/3/1/index.html?itemId=/content/publication/1c258f55-en&_csp=10e9de108c3f715b68f26e07d4821567&itemIGO=oced&itemContentType=book#sect-28)

<sup>2</sup> An example of the Ministry for the Environment gagging clauses can be found in Appendix 4 of document 1.1 (page 20) of this OIA response: <https://fyi.org.nz/request/18488/response/71507/attach/10/OIAD%20214%20Response.pdf>

work on the RMA law reforms. We hope you will be clear about this when speaking to Ministers Parker and Shaw, so they are reassured on that front.

We also need to correct some of the advice provided to you on this commitment. The advice is misleading when it suggests that development of this proposed commitment was 'ranked as a least preferred option' by the EAP and civil society. What occurred was merely an indication of what people wanted to consider at one particular workshop when there was a crowded list of many other proposals relating to civic participation on the agenda. At no point in this process have civil society agreed on criteria for ranking commitments for inclusion in NAP4, let alone actually ranked them. The briefing also works on a false assumption that in a NAP co-creation process, civil society, EAP and agencies' views carry equal weight, and that civil society organisations must all agree equally to the priority of all commitments. The whole point of civil society is that, like the public, it is heterogeneous.

The list of 'similar obligations to the Convention' is likewise highly misleading. First, the Aarhus Convention was developed to give practical effect to the high level statements found in Principle 10 of the Rio Earth Summit Declaration in 1992. Simply pointing to the Declaration would not help people trying to uphold rights to information, participation and access to justice in the way that the Convention would. Second, it would take a brave and well-resourced person or civil society group to bring a judicial review claim that sections 11 and 12 of the Public Service Act are not being delivered. The SDG 16.7 goal of increased public participation is an indicator of development, and again provides no practical means of the public being able to exercise the rights that the Aarhus Convention creates or safeguards. It would be ratification of the Convention that would deliver the practical benefits of the aspirations of the Declaration and Act, and which would show progress on SDG 16.7.

To be perfectly frank, an ambitious Open Government Action Plan would simply commit Aotearoa New Zealand to acceding to the Aarhus Convention. It would show we wanted to join 47 European and Central Asian peers in doing so (as well as the 25 Latin American and Caribbean countries that have signed the parallel Escazú Agreement), and demonstrate leadership on the environment and democracy in the Pacific. We have scaled back our ambition because we understand Ministers will not take this decision without robust advice; hence we are proposing a commitment that delivers that advice through an open and participatory process. We think this commitment would have significant additional benefits by piloting methods for involving those outside government in development of other National Interest Analyses in future.

### **Draft Commitment 7 – Creation of a counter-fraud corruption strategy**

As noted in the A3 table appended to the advice to you from Te Kawa Mataaho, civil society would like to ensure this strategy, that SFO is already funded to develop, extends to cover the private sector. A high integrity public sector is vital, but we consider that much greater value will be derived from the proposed strategy if it also considers how we must, and can, counter fraud outside government.

### **Draft Commitment 8 – Greater transparency of government procurement**

We highlighted in our meeting how vital it is that there is policy progress made in this commitment, namely an agreement to adopt the Open Contracting Partnership Principles for all government procurement. A commitment limited to publishing GETS data in line with the Open Contracting Data Standard will not deliver the benefits we are sure Ministers will want to achieve with regard to higher quality and more competitive procurement of goods and services by government agencies. As noted, GETS only covers 2.5% of government spending, when most procurement now occurs via all-of-government panels of pre-approved suppliers.

### **Draft Commitments 10 and 11**

We were pleased that you were keen to have an ambitious commitment on government use of algorithms. At the moment the approach of the Charter is 'light touch' and we consider work

needs to be both faster and more robust in view of the rapid adoption of novel tools and methods by public sector agencies.

Your commitment to investigate the claims from Treasury officials about the cost of publishing spending data from CFISnet as open data was very welcome. We note that any costs would need to be offset against savings that could be made from avoiding OIA requests for information about the budget and from improved external scrutiny of departments' budget bids.

### **More Ambitious Commitments**

As an indication of just how much civil society has already lowered its own expectations and ambition of the government with regard to this Action Plan, here are ideas that were either ruled out by Te Kawa Mataaho earlier on in the process, or which we did not even bother putting forward because advocating for them would, in our experience, have been a wasted effort:

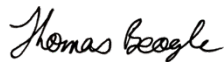
- A Citizens' Assembly to conduct the inquiry into NZ's response to Covid-19, or a deliberative mini-public to decide the scope of the inquiry
- A full independent review of the OIA (along the lines of the Danks Committee), not a limited review to be run by the Ministry of Justice that would struggle to gain public confidence
- Building an integrated online OIA request and complaint platform, similar to the one that has existed in Mexico since 2003 - or even providing some support to the [FYI.org.nz](http://FYI.org.nz) platform that has been run by a volunteer for a decade (as the French government has just done for the comparable [MaDada.fr](http://MaDada.fr) platform)
- Legislating to create a framework for proactive publication of classes of information, and to provide that people can complain directly to the Ombudsman about information withheld from a proactively released document without first having to make a request for it
- An independent review into access to court papers and judgments, and funding for an online platform to manage requests for access
- Create an all-of-government head of profession for public participation who would be responsible for developing knowledge, capability and capacity, and standards in agencies across the government, as well as supporting a community of practice that supports learning and development amongst people working in this field
- Co-creation of a rules on consulting the public on exposure drafts of primary and secondary legislation
- Creation and funding of a video platform for all of Parliament's proceedings, so that people aren't forced to use Facebook to watch their own legislature at work
- Funding Parliament to ensure *Hansard* records are created for oral submissions to select committees on Bills
- Implementing the recommendations of the OECD's 2020 report, *Exporting Corruption*
- Continuing commitment 11 from NAP3 (to build an authoritative dataset of government organisations and release it as open data), since this was unfinished
- Creation of an independent regulator on novel technologies: we have the Environmental Protection Authority controlling what novel substances can be used in the natural environment, but nothing that uses the precautionary principle when it comes to use of CCTV, other surveillance technologies, or use of algorithms in decision making
- Constituting a People's Upper House of Parliament with representatives selected through a national lottery

- Develop and deploy tools suited to policy and decision-making under conditions of complexity. Explore whether an institution along the lines of the former Bioethics Council would assist with this
- Restoring the independence of Archives NZ and providing it with sufficient resources to enforce better and open access to government information including through better recordkeeping from the point of creation
- Create a ‘home’ in government for information, training, education and research on democracy with responsibilities that include normative and substantive issues as well as methodological and procedural ones
- Strengthening the framework of governance over work that former Ministers and senior officials can undertake for a period of time after leaving office - including looking at UK experience with its Advisory Committee on Business Appointments

It was helpful from our perspective to engage with our co-creation partner in our meeting on Wednesday, and we hope it was helpful for you too. This National Action Plan presents an opportunity for the Government to take a strategic approach to open government, in the way previous Action Plans have not. We hope the Government will take this opportunity.

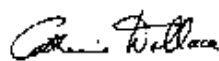
We look forward to hearing from you, once you have received feedback from Ministerial colleagues, so we can work together in a genuine partnership to finalise an ambitious 4th National Action Plan for Open Government.

Ngā mihi,



Thomas Beagle  
Chairperson

**NZ Council for Civil Liberties** **Internet NZ**



Cath Wallace  
Vice-chair  
**Environment and  
Conservation Organisations  
of NZ**



Andrew Cushen  
Interim Chief Executive

**Internet NZ**



Andrew Ecclestone  
Committee Member  
**Trust Democracy**



Julie Haggie  
Chief Executive  
Officer

**Transparency  
International**



Katherine Peet  
Committee Member  
**Network Waitangi Ōtautahi**



Sacha Green  
National Advisor

**Citizens Advice  
Bureau**

## Appendix 1 – Example items for inclusion in a consultation standard

- Consultations are with the public, not limited to handpicked ‘stakeholders’ or ‘interested parties’
- Consultations run for a minimum period – the UK Code of Practice required 12 weeks as a minimum (with variation where urgency could be demonstrated), as this enables civil society groups and private sector organisations to adequately consider the proposals, formulate a response, have the draft response considered by their organisation’s governance bodies
- Consultations must be advertised on the existing DIA-maintained all-of-government webpage for public consultations (<https://www.govt.nz/browse/engaging-with-government/consultations-have-your-say/consultations-listing/>)
- Consultation documents should provide a named person and a direct telephone number, so people can make enquiries about matters related to the consultation. Generic team email addresses alone are insufficient.
- Submissions should be published within a week of the closing date for receiving them, not at the department’s discretion, which is typically after Ministers have made their decisions
- Making the consultation documents available in accessible formats – too often documents are provided in PDF only, which – besides the problems of this format for people with visual impairments – hinders copying and pasting text into submissions as quotations
- Publication of officials’ analysis of the submissions – which the Ombudsmen have been clear is quite distinct under the OIA from the options they propose to Ministers or other decision-makers