REVIEW OF THE *GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009* SUBMISSION FROM THE NSW VICE-CHANCELLORS' COMMITTEE

The NSW Legislation Policy and Criminal Law Review Division provide the following advice in regard to the *Review of the Government Information (Public Access) Act 2009 (GIPA):*

The NSW Attorney General is reviewing the Government Information (Public Access) Act 2009 pursuant to section 130 of that Act and the Government Information (Information Commissioner) Act 2009 pursuant to section 48 of that Act. The purpose of the review is to determine whether the policy objectives of the Acts remain valid and whether the terms of the Acts remain appropriate for securing these objectives.

The policy objective of the Government Information (Public Access) Act 2009 is to open government information to the public by:

a) authorising and encouraging the proactive public release of government information by agencies;

b) giving members of the public an enforceable right to access government information; and

c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

The objective of the Government Information (Information Commissioner) Act 2009 is to establish an independent champion of open Government.

The review will also consider the relationship between the Government Information (Public Access) Act 2009 and the Privacy and Personal Information Protection Act 1998.

1. Whether policy objectives remain valid

The sector is a keen supporter of freedom of information and transparency in reporting, in keeping with the traditional values of universities as liberal, knowledge centered communities. The universities support the current stated policy objectives which underpin the GIPA Act. Universities seek to comply and actively support the policy objects of GIPA by:

a) Proactively implement policies and procedures to promote compliance with GIPA;

b) Proactively publishing information about the universities which is considered to be in the public interest, including current and historical annual reports, staff and student demographic information, university strategic plans and policies, etc;

c) Dedicating specialized resources to facilitate the provision of information to members of the public, through both informal and formal processes.

2. Whether the terms of the Act(s) remain appropriate for securing the policy objectives.

2a) Schedule 2: Excluded information of particular agencies – 4. Other information
Universities are included in the Excluded Information of Particular Agencies under Schedule 2, part 4 of GIPA, which states that:
"Universities – functions relating to dealing with information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions"

This exemption was transferred from the rescinded *Freedom of Information Act 1989* to the GIPA legislation after consultation with the universities in 2009. The universities supported the continued inclusion of this exemption on the basis that information on and individual's ranking was calculated from individual results, which are treated by the State Government as confidential, and provided to universities and UAC on a strictly confidential basis, to be used for ranking purposes only. Universities noted that the methods of calculation of the ATAR have been made readily available to the public, and consider that any further disclosure would violate student privacy, and would not be in the public interest.

Recommendation: The NSWVCC considers that this exemption remains consistent with the policy objectives of GIPA and should continue in its current form.

2b) Division 5 – Government Contracts with private sector
Universities consider that Division 5 *is not* appropriate to the policy objectives in its current form, in relation to universities.

ISSUE
The GIPA Act requires NSW universities to publish a register of all contracts of a value of more than $150,000. The NSWVCC considers that universities should be considered as similar to State Owned Corporations (SOCs), and be included in s39 of GIPA which provides that:

S39 *Exception for SOCs – competitive neutrality* under *Division 5 – Government Contracts with private sector*:
This Division does not require a State owned corporation [SOC] or a subsidiary of a State owned corporation to include any information about or a copy of a government contract in its government contracts register if the contract relates to activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

MATTERS FOR CONSIDERATION
Only a small proportion of university funding comes from any level of government. On average, only 3% of universities' funding is provided by the NSW Government, and 40% or less is provided by the Commonwealth government. The financial stability of public universities in NSW relies to a large extent on their ability to engage in a range of activities with private sector entities in order to generate revenue. Such activities include entering into contracts whereby the university provides consultancies and research collaboration and/or partnerships with industry, commercialization of research, the management of

intellectual property, and also where universities engage with agents and enter into joint venture agreements to develop international research agreements and student recruitment. This is recognised by university legislation, under which the commercial activities of universities are subject to Commercial Guidelines.

Universities are large, complex entities and typically enter into a thousand or more contracts per year. While the majority of these are included in the Contracts Register published by each university, there are specific types of contracts, as noted above, which by their inclusion in the register put NSW universities at strategic and commercial risk. These contracts are negotiated in a highly competitive environment, with each university competing against other public and private institutions, and overseas universities for this valuable revenue. Requiring NSW universities to include details of these contracts in a publicly available contracts register, as required under Division 5, has the potential to place NSW universities at a significant commercial and competitive disadvantage. Such contracts contain significant amounts of commercial-in-confidence information, and in fact the very existence of a commercial contract may in itself be commercially sensitive, as it signals to competitors that research or other work in a particular area is being conducted.

As noted above, many university contracts generate revenue to universities, rather than an expenditure of public monies. It is of significant concern that current investors in research may begin to channel research funding to universities in other states who are not subject to the reporting requirements of GIPA, to retain confidentiality and competitiveness. This has the potential to precipitate a reduction in research undertaken in the State's universities, the loss of key researchers to universities outside NSW, and a significant decrease in the quality of research projects and funding in NSW.

Key concerns

- Universities need to be able to provide 'commercial in confidence' surety to their commercial partners in a highly competitive market
- Inclusion of highly sensitive contracts in the contracts register provides information to other universities, both nationally and internationally, which indicates strategic links, projects and financial commitments in an environment that is commercially sensitive and highly competitive.
- The requirement to publish sensitive contracts is strategically poor for both universities and their industry partners, and is a deterrent to collaboration and private investment in research and development, resulting in a loss of income, and research and development opportunities for universities in NSW.

DISCUSSIONS WITH THE INFORMATION COMMISSIONER

Recent discussions with the Information Commissioner have been helpful and have provided a variety of ways in which universities could address their concerns, including:

a. *Redacting commercial-in-confidence sections of contracts*

b. *Creating summary document or template of what information can be selected from a contract and included on the register*

c. *Ascertain circumstances, provided within the GIPA legislation eg under s14, where it is appropriate to refuse to disclose the identity of parties to a contract,*

The universities appreciate the Information Commissioner's advice, and in general have been utilizing these strategies since 2009. However, given the volume of contracts undertaken by the universities, and the significance of revenue-raising contracts to the stability and operation of the sector, a more streamlined, burden-reducing option would be to include the universities in s39, thereby eliminating the need for universities to consider each contract on a case-by-case basis, and the need to provide documentation for decisions to redact or withhold information in every case where it is necessary to do so, as required under s32.

CONCLUSION

Universities are not opposed to publishing a Contracts Register for the majority of contracts undertaken, particularly in regard to contracts which solely require the expenditure of university funds which are public monies. Universities seek exception for commercial-in-confidence contracts that would be subject to their Commercial Guidelines (as approved by the Minister under current university legislation) which are revenue generating, and which would provide insight into matters which may indicate the strategic directions of a university, or commercially sensitive research being undertaken with an industry partner.

***Recommendation**:* The NSWVCC *recommends* including NSW universities in s39 of the GIPA Act to provide protection for vital revenue-generating activities of the universities, allowing them to pursue and develop such commercial activities on the same footing as their competitors.