

REVIEW OF THE GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009

The University of Western Sydney (“UWS”) makes the following submission in relation to the review of the *Government Information (Public Access) Act 2009* (NSW) (“GIPA Act”) by the NSW Department of Justice pursuant to s.130 of the GIPA Act.

UWS notes that submissions closed on 29 August 2014, but hopes that this submission will be considered.

Questions about this submission should be directed to:

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1. Whether the policy objectives of the GIPA Act remain valid

UWS, as a public institution in receipt of considerable levels of government funding, at both Commonwealth and State level, is strongly committed to the principles of transparency and accountability in the management and operation of its affairs, not just to internal stakeholders (especially students), but to the broader community.

To that end, UWS has implemented policies and processes to promote transparency in compliance with the GIPA Act and, more broadly, as part of its operational culture.

2. Whether the terms of the GIPA Act remain appropriate for securing the policy objectives

Schedule 2: Excluded information of particular agencies – cl. 4 – other information

UWS agrees with the submission of the NSW Vice-Chancellors’ Committee that the exclusion currently applicable to ranking or assessment of HSC students currently available under Schedule 2, Part 4 of the GIPA Act should continue in its current form, as it is consistent with the policy objectives of the GIPA Act.

Division 5 – Government contracts with private sector

All NSW universities are currently required to publish registers of all contracts of a value of \$150,000 or more (“GIPA registers”). In addition, universities are required, under their own enabling acts, to maintain registers of commercial activities (regardless of the value)¹. The form and content of those registers are as prescribed by commercial activities guidelines².

The requirement for universities to effectively maintain two registers (with different requirements as to form and content) is inefficient and costly. Moreover, there are some commercial activities carried on by universities, such as industry-funded collaborative research, consultancies and commercialization and management of intellectual property rights, where confidentiality of contractual terms is critical in

¹ See for example *University of Western Sydney Act 1997* (NSW) s.32(1)

² See for example *University of Western Sydney Act 1997* (NSW) s.32(2)

order to protect the business interests of both universities and their contracting partners. While acknowledging the need for accountability and transparency, this requirement nevertheless has the capacity to expose universities to significant disadvantage. In particular:

- Universities are expected to operate in an environment of competitive neutrality. Applying a standard that does not also apply to their private sector competitors is inconsistent with that principle;
- although there is some level of exemption from disclosure of “commercial-in-confidence” provisions of a contract³, it should be noted that:
 - the exemption applies only to “commercial-in-confidence provisions” of a contract as these relate to the contractor, not the government agency⁴. Thus, and for example, any intellectual property rights in which the university has an interest may not be exempt from disclosure on the register;
 - in any case, there is a level of uncertainty about the extent to which such an exemption can apply. Universities may thus be exposed to claims of non-compliance with Division 5, or to challenges (which may escalate into legal action) to decisions to refuse access. It should also be borne in mind that the provisions of the GIPA Act can be used by other parties (including competitors) to effectively conduct “fishing expeditions” not normally allowed under the rules of discovery of evidence applicable in litigation (for example, a challenge to an application to register a patent).
- the NSW Parliament recently assented to the *Universities Legislation Amendment (Regulatory Reforms) Bill* 2014, which implements a number of regulatory reforms to reduce so-called “red tape”, and to give universities greater autonomy over internal governance and management of their financial affairs. One significant reform is removal of the requirement for universities to obtain the consent of the NSW Minister for Education on the recommendation of the NSW Treasurer about the content of their commercial activities guidelines (which, as noted above, are the mechanisms that prescribe the form and content of commercial activities registers). Universities have welcomed this as a sensible reform that recognizes their role as responsible public institutions, and facilitates more regular reviews to ensure the integrity and accountability of commercial activities guidelines and processes.

Recommendation

UWS recommends that universities should be exempt from the requirement to maintain GIPA registers under Division 5. For the reasons outlined above, it is submitted that commercial activities guidelines and register that all NSW universities are required to maintain, pursuant to their enabling acts, will provide necessary levels of transparency and accountability in relation to their various commercial activities.

³ *Government Information (Public Access) Act* 2009 (NSW) s.32(1)(a), (d)

⁴ See definition of that term, Sch. 4