

INQUIRY INTO CONSULTATION ON HIGHLY CONTENTIOUS BILLS

Organisation: Information and Privacy Commision NSW

Date Received: 6 November 2019



Mr Stewart Smith
Director Procedure
Legislative Council
Parliament of New South Wales

By email: ProcedureCommittee@parliament.nsw.gov.au

Dear Mr Smith,

Consultation on highly contentious bills

The purpose of this correspondence is to make a submission to the inquiry of the NSW Legislative Council's Procedure Committee into Consultation on highly contentious bills. I have had regard to the Committee's terms of reference for the inquiry and the discussion paper.

Introduction

As NSW Information Commissioner I consider a good government is one that encourages transparency through the release of information, including data in the public interest. Transparency and accountability coupled with strong, institutionalised mechanisms for public participation with government are essential features of open government. There are long term positive impacts on the community from openness.¹ For open government to flourish proactive mechanisms should be mandated for both the release of information and public engagement.

In my view, it is in the public interest² that for highly contentious legislation there is a mandated and extensive consultation process. I consider that civic participation is a core component of open government. The following submission makes clear that the scope of consultation referred to in the discussion paper is supported by:

- Principles of good engagements and the *Charter for Public Participation - a guide to assist agencies and promote citizen engagement* (the Charter for Public Participation) which I developed and released in June 2018
- The object of the GIPA Act, which espouses open government
- The work of the Open Government Partnership (OGP) and National Action Plans concerning open government.

Principles that guide good engagements

A strategy for empowering the community through public engagement is important in circumstances where 90% of Australians believe they are without influence over the

¹ <<https://www.opengovpartnership.org/campaigns/global-report/collective-results-open-government-ogp/>>

² Note the *Government Information (Public Access) Act 2009* (GIPA Act) is underpinned by a public interest test referred to in this submission.

federal government.³ 70% of Australians came to the same conclusion in respect of other levels of government.⁴

However, there is also 'strong support for the processes of representative democracy such as consultation, compromise and democratic judgement and citizens display a considerable understanding of its complex processes...findings [of the University of Canberra's Institute for Governance and Policy Analysis] also indicate that citizens could be up for a more extended role if a different politics was on offer that was more participatory, open and perhaps local.'⁵

Charter for Public Participation

The discussion paper refers to the Charter for Public Participation released by me in June 2018. This Charter could be considered as a model strategy for proactive engagement.

The Charter assists NSW agencies in seeking effective public input into the development and delivery of policies and services. It provides a practical and principle-based approach for embedding public participation in agency decision-making frameworks and policy development. It brings together leading authorities and resources to build capacity and guide the NSW public sector in engaging with the community.

Public participation is a fundamental tenet of democracy and 'Open Government'.⁶ The Organisation for Economic Co-operation and Development (OECD) recommends that in order to embed public participation as part of their core business, governments should provide:

- strong leadership and commitment
- coordination of public participation across and within government agencies
- adequate financial, human and technical resources
- appropriate guidance and training
- a supportive and accountable organisational culture.

The Charter for Public Participation provides a number of examples of engagement and case studies. For instance, Appendix 2 lists a number of examples of online tools used to promote public participation, such as the Department of Social Services' online engagement platform.⁷ Appendix 3 describes additional case studies on public participation including labs, which are creative multi-disciplinary environments where diverse stakeholders can be engaged. Other consultative examples are referred to including deliberative polling and mapping and participatory strategic planning.

³ See Museum of Democracy, Old Parliament House *Annual Report 2016-17* < <https://moad-web.s3.amazonaws.com/heracles-production/4d3/abf/652/4d3abf652b50a5133e09f080fe908887d62df7891888791ba878e4a09598/old-parliament-house-annual-report-2016-17.pdf> >

⁴ This data comes from a February 2013 survey by the University of Canberra's Institute for Governance and Policy Analysis in research partnership with the Museum of Democracy <https://www.governanceinstitute.edu.au/our-director/research-case-studies>

⁵ Ibid.

⁶ <<https://www.ipc.nsw.gov.au/information-access/open-government-open-data-public-participation>>

⁷ <<https://engage.dss.gov.au>>

The Charter for Public Participation is underpinned by the GIPA Act, which has as its object to advance government that is open, accountable, fair and effective.

Principles of the GIPA Act – Open Government

The GIPA Act sets a mandate for open government. The object of the Act is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective. The object of the Act is to open government information to the public by:

1. Authorising and encouraging the proactive public release of government information by agencies
2. Giving members of the public an enforceable right to access government information
3. Providing that access to government information is restricted only when there is an overriding public interest against disclosure.⁸

The GIPA Act designates four information release pathways. They include release of government information informally to a person, release in response to a formal access application and mandatory and authorised proactive release of government information.

Under the GIPA Act there is a general public interest in favour of the disclosure of government information. The GIPA Act provides for a balancing of considerations in favour of and against disclosure, having regard to the public interest. This is known as the 'public interest test'. The test requires consideration of:

1. The presumption in favour of release of government information;
2. Identification of factors in favour of disclosure;
3. Identification of factors against disclosure; and
4. Balancing of factors to determine where the public interest lies.

There is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance; those considerations outweigh the public interest considerations in favour of disclosure.

The GIPA Act requires NSW government agencies to make open access information publicly available. Such information includes an 'agency information guide' that must contain information about any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions, among other things.⁹

The object of the GIPA Act (described above) seeks to advance a system of responsible and representative democratic Government by opening government to the public. In my view, public consultation in the ways explored in the Committee's discussion paper is aligned with the object of the GIPA Act and opens government deliberations and decision-making to the public.

⁸ Section 3, GIPA Act.

⁹ Section 20(1)(c), GIPA Act.

Open Government Partnership and National Action Plan (NAP)

The OGP Articles of Governance state that 'OGP participants commit to developing their country action plans through a multi stakeholder process, with the active engagement of citizens and civil society'. The OGP has published *OGP Participation & Co-Creation Standards*¹⁰ which set principles/ values for participation, namely:

- Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
- Public participation includes the promise that the public's contribution will influence the decision.
- Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
- Public participation seeks input from participants in designing how they participate.
- Public participation provides participants with the information they need to participate in a meaningful way.
- Public participation communicates to participants how their input affected the decision.

The following initiatives demonstrate the importance of public participation and the various ways the public might be engaged in order to open government.

Open Government – National FOI Metrics

Published on the Information and Privacy Commission NSW's (IPC) website is a dashboard of metrics on public use of freedom of information (FOI) access rights.¹¹ They enable the community to examine the performance of their local FOI laws and to advocate accordingly. The metrics were developed as a result of a commitment of Australia's first Open Government National Action Plan to develop uniform metrics on public use of FOI access rights to promote the importance of better measuring and improving our understanding of the public's use of rights under freedom of information laws.

Open Government – Key Features of FOI Laws

As part of the examination by Australian jurisdictions of FOI access rights and proactive release of government information, the IPC led a project for the AIAC exploring the key features of right to information (RTI) legislation. The key features present an aspirational expression of an effective and efficient RTI/FOI legal framework.

¹⁰ <http://www.opengovpartnership.org/wp-content/uploads/2019/07/OGP_Participation-Cocreation-Standards20170207.pdf>

¹¹ <<https://www.ipc.nsw.gov.au/news/release-inaugural-dashboard-and-metrics-publics-use-foi-laws>>

The key features framework has been developed in recognition that RTI/FOI legislation is an essential mechanism to enable members of the public the opportunity to scrutinise the actions of government. Giving people access to the information used by policy makers and governments provides a meaningful level of accountability and induces a much higher level of public participation, awareness and interest in policy-making and government itself.

The key features have been developed by drawing on:

1. Commitments that promote transparency and information access outlined in *Australia's Open Government Partnership National Action Plan 2016-18*, and *Open Government Partnership National Action Plan 2018-20*
2. Agreed standards promulgated by international bodies such as United Nations, the Organisation of American States, the Council of Europe, the Organisation for Security and Cooperation in Europe and the African Union
3. Academic commentary from recognised experts in FOI/RTI legislation, and key indicators for a right to access information legal framework developed by Access Info Europe and the Centre for Law and Democracy.¹²

Second National Action Plan – Citizen Survey on right to access government information

On behalf of the Association of Information Access Commissioners (AIAC), I engaged with the Department of Prime Minister and Cabinet in the development of new commitments for inclusion in the *Second Australian National Action Plan 2018-20*, released on 21 September 2018. The IPC led a commitment in the second NAP to engage States and Territories to better understand information access through data. This commitment provided for subnational participation in the Open Government Partnership process to build understanding of information access frameworks and was achieved by:

1. Facilitating administrative arrangements between State and Territory governments and Australian Government officials responsible for Australia's Open Government commitments to support collaboration and learning on open government matters (including highlighting the opportunity for formal subnational cooperation and membership in the Open Government partnership); and
2. Engaging with Information Commissioners and Ombudsmen to seek agreement to conduct surveys to measure citizens' awareness of the right to access government information, and their experiences and outcomes in exercising that right. These surveys will inform activities to promote and support the right to access government information.

The citizen survey measured the value that citizens place on the right to access government information, their awareness of that right, and their experiences and outcomes in exercising that right.

¹² Please contact my office, should you wish to view a copy of the key features document.

The results of the survey were released jointly by the participating Information Commissioners and Ombudsmen on 30 September 2019 during Right to Know Week 2019.¹³ The survey results are published on the IPC's website.

Key findings of the survey include:

- The importance of the right to access information is consistently recognised by respondents across state and national jurisdictions (85 – 93%)
- The majority of respondents across the jurisdictions were aware that they had the right to access information from government departments/agencies (77- 85%).
- Around 4 in 10 respondents had contacted at least one government agency in the past three years to obtain government information.
- In general, citizens were able to obtain information successfully (60 – 91%).

The right to access government information is evidently important to citizens. Public participation and engagement with government is facilitated by that access.

At the international level, OPG participants are implementing a range of commitments to increase and facilitate community participation in government decision making. These initiatives include:

- Argentina is reviewing its legislation governing popular initiatives to include the technological and social changes that have taken place since the legislation was initially passed in 1996. The Bill will be designed through a participatory process in order to improve the existing regulations and ensure actual citizen participation in the lawmaking process.
- United Kingdom is developing resources to support Open Policy Making (OPM) for more informed and better designed policies with the human experience in mind. To implement this, the Government's Policy Lab will develop the OPM toolkit and work with stakeholders like the Policy Profession and departments to consider the levers these groups have over how policy is made; conduct user research with policymakers; increase the transparency and accessibility of evidence; and to make policy resources publicly available.
- Lithuania is strengthening the capacity of Non-Government Organisations (NGO) to participate in decision-making processes through the creation of an NGO fund to strengthen NGO capacity. The NGO fund will carry out regular monitoring of developments regarding the public participation in public policy and decision-making processes.
- Ireland is facilitating meaningful engagement with Local Authorities by the community, voluntary and environmental sectors through the establishment of a public participation network and national PPN Advisory Group and other supports.

Other international developments include the response in March 2019 by the Joint Committee on the Draft Parliamentary Buildings (Restoration and Renewal) Bill calling for an amendment to include a requirement that the Sponsor Body must use the Restoration and Renewal programme to promote public engagement and understanding of Parliament.

¹³ <<https://www.ipc.nsw.gov.au/media-releases/nsw-information-commissioner-releases-results-community-attitudes-research-and-launches-citizen-checklist-right-know-week-nsw-2019>>

Additionally, programs to harness digital technology to increase public engagement with parliament are under implementation internationally. For example, the UK government promotes opportunities for digital debates: <https://www.parliament.uk/digital-engagement-programme>.

Conclusion

An incentive to consult widely before introducing contentious bills is that it creates citizen buy-in in respect of government initiatives and programs. As noted above, there are long term positive impacts on the community from public participation with government and open government initiatives.

With reference to the Charter for Public Participation, I support consultation and deliberative democracy.

There are various ways to effectively engage the public in government deliberations and decision-making and I encourage the Committee to have regard to the initiatives of the OGP and its *Participation & Co-Creation Standards* which set principles/ values for public participation.

Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact

Yours sincerely

Elizabeth Tydd
Information Commissioner
IPC, CEO

