



information  
and privacy  
commission  
new south wales

## SUBMISSION TO INQUIRY INTO THE CONDUCT OF ELECTIONS IN NEW SOUTH WALES

Submission by the Information and Privacy Commission NSW

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The Information and Privacy Commission NSW (IPC) welcomes the opportunity to provide a submission to the Select Committee's Inquiry into the conduct of elections in New South Wales.

### **About the IPC**

The Information and Privacy Commission NSW (IPC) oversees the operation of privacy and information access laws in New South Wales.

The Privacy Commissioner has responsibility for overseeing and advising NSW public sector agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act).

The Information Commissioner has responsibility for overseeing the information access rights enshrined in the *Government Information (Public Access) Act 2009* (GIPA Act) and exercises functions under the *Government Information (Information Commissioner) Act 2009* (GIIC Act). The Information Commissioner also holds the role of NSW Open Data Advocate, in which capacity she provides advice across the NSW Government on nonpersonal data that should be released to the public.

The IPC is an integrity agency with functions that are fundamental to the preservation and advancement of representative democratic Government. Section 3 of the GIPA Act provides that the object of the legislation is to open government information to the public in order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective.

## **Access to Information and the promotion of a system of responsible and representative democratic Government<sup>1</sup>**

The Terms of Reference note that the Select Committee will inquire into the conduct of elections under COVID-19 conditions, and in particular the conduct of relevant local government elections and state by-elections. The GIPA Act and regulations contain provisions which complement these democratic processes.

The ability to access government information is central to the maintenance of democratic Government. The GIPA Act establishes a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure. Open access information under section 6 of the GIPA Act mandates that certain government information must be made publicly available free of charge on a website maintained by the agency. Authorised proactive release under section 7 of the GIPA Act encourage agencies to make government information available to the public without the need for a formal access application.

The pro-integrity provisions of the GIPA Act also target specific risks to integrity in various government sectors subject to its operation. Under open access requirements, local councils are required to publish returns of pecuniary interests of elected officials and designated persons. The proactive disclosure of this information ensures transparency, accountability and provides a necessary assurance that elected officials and other publicly funded senior decision makers, place the public interest above their private interests as demanded by, and expected of, public office. Importantly, disclosure of interests minimises the risk of fraud and corruption.

In March 2022 the Information Commissioner published the [\*Report on the Operation of the Government Information \(Public Access\) Act 2009: 2020 – 2021\*](#), which found that there remains an unacceptable level of non-compliance in respect of the specific pro-integrity disclosure requirements in the local government sector. Low levels of compliance were identified in the Information and Privacy Commission's (IPC) targeted compliance audit of the sector and subsequent report. That compliance report found that approximately 30% of audited councils were non-compliant and overall, there were inadequate systems, policies and practices to support compliance. This issue continues to be a focus for the IPC.

Additionally, the role of the Information Commissioner was established under the GIIC Act to be a 'champion of open government'. In this capacity the advocacy and work program of the Information Commissioner must respond to a new government paradigm – digital government. That paradigm requires a shift from a digital transactions approach or e-government to one that ensures that democratic processes and values are embedded in all manifestations of digital government. Safeguarding this transition to e-governance is central to the Select Committee's terms of reference.

### **From e-government to e-governance and promoting Open Government**

This inquiry presents an opportunity to consider the largely unrealised opportunities to harness e-government to advance democratic principles.

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<sup>1</sup> Section 3 GIPA Act

*The wide use of information technology by Governments raises a number of issues and perspectives that have to be taken into consideration - social, economic, technical, legislative and other matters that may have an impact on the wider society. Unlike business enterprises, government plays different roles. In some contexts it is the regulator, in others it is the initiator and in others it is a partner with private industry to improve the management of its business. Having said all this it is important to understand that the reason for which Government exists is fundamentally different from those of private industry or enterprise. From this one can further argue that the use to which information technology is put is also different. In the G8 Government Online and Democracy White Paper, Paul Bird, the chairman of the G8 Government On-line Steering Group, argues that the issues cover a wide range from governments trying to raise awareness about the democratic process and the system of government to enhancing public participation in the process of government and administration.<sup>2</sup>*

E-governance manifests as the *use of information and communication technologies (ICTs) to support citizen services, government administration, democratic processes, and relationships among citizens, civil society, the private sector, and the state.*

Importantly e-governance necessitates inculcation of digital democracy, online citizen participation, and online public discussion along with the aspects of online public service delivery.

In the provision of services, ICTs are enabling the decentralisation of services and the introduction of a “one-stop shop” culture. In some situations, they are also facilitating the decentralisation of authority. The increased decentralisation should also be accompanied by increased accountability.

Accordingly, as government rapidly advances a digital transformation agenda as has been required in recent years it must also actively engage in the inculcation of mechanisms to ensure and promote Open Government. In doing so the essential elements of Open Government:

- Transparency
- Integrity
- Accountability
- Citizen Participation<sup>3</sup>

must be re-examined in this new context and galvanised to ensure our democratic principles survive within government and the administrative systems of government.

The Select Committee’s consideration of *the adequacy or otherwise of material alerting voters to the upcoming by-elections* has specific relevance to citizen participation. E-government presents opportunities to harness technology to ‘push’ information out to citizens as a foundation for a better-informed community. From this position engagement can then be stimulated to facilitate citizen participation and confidence.

*The complexity of issues governments face and the social and technology forces undermining community confidence are universal.<sup>4</sup>*

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<sup>2</sup> GLOBAL SURVEY ON ON-LINE GOVERNANCE FINAL REPORT by The Commonwealth Network of Information Technology for Development Foundation (COMNET-IT) United Nations Educational, Scientific and Cultural Organization Paris, 2000

<sup>3</sup> OECD Open Government

<sup>4</sup> ‘Let the Sunshine in’ Review of culture and accountability in the Queensland public sector. Final Report 28 June 2022

In this context, citizen participation and confidence will only be optimised when accompanied by transparency of information, integrity systems and the accountability of government to its citizens.

A transition from digital leaders (government) and followers (citizen users) to a fully participative democratic government is made more viable if digital services are more readily accessed by all and if e-governance is central to the delivery of digital services by government.

E-governance requires the commitment of leaders to invest strategically, operationally, culturally, and financially in upholding our democratic values in the context of e-government.

### **iVote Software**

The iVote voting system provides eligible voters with the opportunity to cast their vote online or over the telephone in state elections. The system has been used in NSW since 2011. Access to the iVote system assists eligible individuals to exercise their voting rights and contribute to the democratic process.

In this context we note the provisions under the GIPA Act concerning the proactive disclosure of government information. Under these provisions, information should be proactively published for citizens on the operation and eligibility requirements of the iVote system.

It is noted that the iVote system will not be available for the 2023 NSW election as the current version of the iVote software used by the NSWEC is being phased out and timeframes preclude the development of a new version before March 2023.<sup>5</sup> A recent article by Professor Sarah Murray and Narelle Miragliotta highlighted concerns with the current iVote system following systems errors experienced during the local government elections.<sup>6</sup>

As the NSWEC considers the future of the iVote system, the agency must continue to improve NSWEC's cyber security posture to reduce the likelihood that future elections are compromised due to foreign interference from cyber-attacks. The Commissioners note that to invest in systems modernisation and ensure that adequate cyber security safeguards remain in place, it is imperative that the NSWEC receives adequate funding to deliver on its mandate. This will also support NSWEC in fulfilling its obligations under section 12 of the PPIP Act, in which public sector agencies that hold personal information must ensure that the information is protected, by taking such security safeguards as are reasonable in the circumstances, against loss, unauthorised access, use, modification or disclosure, and against all other misuse.

The IPC notes that a range of privacy and information access issues may arise in relation to developing and implementing electronic voting systems, including:

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<sup>5</sup> Electoral Commissioner Determination, March 2022 <https://www.elections.nsw.gov.au/About-us/Media-centre/News-media-releases/Electoral-Commissioner-iVote-determination>

<sup>6</sup> Narelle Miragliotta and Sarah Murray, 'iVote, the 2021 NSW Government Elections and the Future of Internet Voting' on AUSPUBLAW (01 June 2022) <https://www.auspublaw.org/blog/2022/06/ivote-the-2021-nsw-government-elections-and-the-future-of-internet-voting>

- ensuring procurement processes for development of systems that incorporate provisions respecting privacy and information access;
- compliance with mandatory contracts disclosure requirements under the GIPA Act;
- proactive publication of information and relevant policies on the operation of electronic voting systems;
- implementation of an audit capability and monitoring processes;
- access controls to limit the number of staff who may access personal information;
- retention of data and contractual relationships that ensure government retains information and importantly access to information regarding system performance and performance assessment;
- development of data breach policies and procedures; and
- privacy and data security training for staff and the use of privacy impact assessments.

The IPC would welcome the opportunity to consult with the NSWEC on any of these issues as necessary going forward.