Executive Summary

The perils of the hurried, often-heated atmosphere in which the Legislature proposes, debates and finally decides the fate of thousands of bills annually includes well-intended change that creates unintended consequences. Legislation can unexpectedly miss its mark when those who interpret and implement it respond differently than sponsors anticipated.

So it is with California's open meeting laws. With the best of civic intentions they are stifling the ability of the state's public officials to govern effectively. They are due for reconsideration.

The Little Hoover Commission, in a 10-month review, has examined compliance issues with California's two primary open meeting laws, the Bagley-Keene Open Meeting Act for state government and the Ralph M. Brown Act for local government. The Commission focused on the unexpected impacts of reforming the Brown Act in 2008 and incorporating those changes in 2009 into the Bagley-Keene Act. The enacted reforms, sponsored by the California Newspaper Publishers Association, attempted to resolve a confusing 2006 state appeals court ruling related to open meetings. Specifically, the reforms aimed to altogether ban serial meetings (in which Commissioner A conveys a view privately to Commission B who conveys it to Commissioner C to reach a majority consensus) by ensuring that a majority of an entity's members cannot communicate via any means outside a noticed meeting to discuss, deliberate or take action on a matter under their jurisdiction.

These reforms resolved the ambiguity created by the 2006 court ruling. But the additional language has created a surprising consequence – less government transparency. Constraints on internal discussions by appointees and elected officials have driven more decision-making downward to the staff level and out of sight of the public. Many participants in the Commission's study process said staffers who are not accountable to the public in elections or through the appointments process are gathering more consensus and making decisions internally for leaders to ratify in public meetings. More troubling, lobbyists who understand the constraints faced by decision-makers can use conversations with individual office holders to subtly nudge them toward consensus for their own ends.

The Commission learned that public sector attorneys have urged such an abundance of caution as a result of the changes that many elected and appointed officials fear talking with one another outside public meetings. An exploration of these developments and recommendations to resolve them with a small adjustment of statutory language is at the heart of this report.

The Commission also examined the everyday use of private conversations in the executive branch between government officials and the interests they regulate. These so-called "ex parte communications" have become a significant concern during the past year, driven by allegations that some officials at the California Public Utilities Commission held unreported and illegal private conversations with the utilities they regulate.

During its study process the Commission considered whether private conversations between regulators and the regulated are appropriate. It examined the array of rules employed by various agencies throughout state government and also reviewed policies used by the federal government. The Commission concluded that these private conversations are, in most cases, a necessary and effective tool of information gathering and governing – and recommends that current rules stay in place, while giving consideration to additional transparency and accountability that could provide Californians optimum insight into state government decision-making.

Drawing the Line

Tensions over where to draw the line on private conversations within an open government are central to a democratic society. A state regulatory official's ability to meet privately with lobbyists or a county supervisor's wish to discuss general policy issues informally with colleagues can be another person's definition of secret government. The 2008 and 2009 reforms to the Brown and Bagley-Keene acts tried admirably to find a best way forward. But they created unforeseen governing problems that require fixing for the good of Californians.

The Commission frequently heard during its review that changes made to the state's open meeting acts have confused appointed and elected officials regarding what they are allowed to do outside public meetings – and more importantly, what they can't do. Media interests and other supporters of tough open meeting act laws simultaneously contended to the Commission that the confusion is unnecessary, the laws do not need to be fixed and that government attorneys are simply interpreting them incorrectly.

But the legal muddle and overflow of caution inside the public sector is obviously real and having a corrosive impact on public decision-making. Elected and appointed officials throughout California told the Commission they feel obstructed in efforts to gather quality information and make the best possible decisions for those whom they represent. Many who serve on state boards and commissions or on city councils and boards of school districts and special districts, say they so fear violating the state's open meeting acts and dragging their entity into lawsuits that they are afraid to talk privately about even the most general matters with their colleagues or be seen together at events outside of public meetings. Their government attorneys, perpetually on the watch against open meeting act legal challenges that could endanger or overturn multimillion-dollar decisions or hard-fought compromises, interpret open meeting laws conservatively and advise officials to exercise maximum caution.

As a result, officials are cautious. Many are frequently in the dark about what their colleagues are thinking. They sit behind their microphones in public, often unwilling to engage in frank and robust discussions necessary to reach good compromises. Several told the Commission privately and in public settings that they fear saying something off-base or naïve that invites ridicule or provides fodder for political opponents to use against them.

Californians, who live in a landscape of great complexity and hard public choices, who endure the many consequences of poorly-informed decisions, deserve better than this. Many legal experts and stakeholders believe it would take no more than a few clarifying words in the state's open meeting laws to better balance the public's right to observe and participate in their government with officials' need to govern. The Little Hoover Commission agrees with them.

Meanwhile, the Commission also heard disturbing accounts from city councilmembers and members of other public bodies about a secondary issue related to the Brown Act – an inability to curb abusive public comment at open meetings. Officeholders described how the same band of commenters faithfully shows up at televised council meetings, particularly in the City of Los Angeles, to heckle them, curse, sing, talk in funny voices, dress in offensive or outrageous costumes and make comments only slightly related to the agenda topic. Commissioners heard that attempts to rein in this abusive and time-wasting behavior has primarily resulted in lawsuits and the necessity to pay public funds to these commenters. Elected officials told the Commission that neither the Legislature, nor the courts, tolerate such behavior.

The Commission, long guided in its studies by principles of accountability, transparency and advancing the public interest, believes wholeheartedly in open government and the public's right to access it. In that spirit, it recommends a small adjustment to each of California's open meeting acts to provide state and local officials more ability to discuss general policy issues among themselves outside of public meetings – while continuing to prevent them from reaching agreement on future votes or decisions. The Commission, likewise, recommends a fresh look at ways to curb abusive use of public comment opportunities.

In light of the widespread interest and concerns throughout California about open government at the state level, the Commission also offers recommendations to enhance public access to executive branch, board and commission deliberations while ensuring that those who govern can do so effectively.

Recommendation 1: The Legislature should adopt new language to various state government codes to clarify that appointed officials of state boards and commissions can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Bagley-Keene Open Meeting Act.

Recommendation 2: The Legislature should adopt new language to various state government codes to clarify that local elected officials and their appointees to local and regional government bodies can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Ralph M. Brown Act.

Recommendation 3: A working group led by trade associations such as the League of California Cities, California State Association of Counties, California Special Districts Association and California School Boards Association should consider a fresh legal approach to maintaining decorum and policing public comment during open meetings – in line with that employed by the Legislature – that will help rein in abuses by some members of the public.

Recommendation 4: The State of California should retain all existing executive branch policies that ban ex parte communications in adjudicatory proceedings. The state also should retain its current array of ex parte policies that provide useful information to executive branch decision-makers and govern a variety of quasi-legislative proceedings, quasi-judicial proceedings and a variety of hybrid proceedings with consideration as to additional transparency and accountability.