

An invitation to open government

Accountability and transparency in government decisionmaking, and access to information were the main themes of the Public Interest Advocacy Centre conference on Open Government, held in Sydney on February 10

Developments in NSW, where the government recently introduced rights for citizens to be given reasons for decisions, and to appeal government - including Freedom of Information - decisions to the new Administrative Decisions Tribunal (ADT), were key to much of the discussion at the recent Public Interest Advocacy Centre (PIAC) conference.

The first section of the program addressed the issue of participation in government. John Hannaford, Shadow Attorney-General and Minister for the Arts, outlined proposals for a framework for parliamentary access to information, and for greater transparency and accountability from the public service and the institutions and processes of government. These included a public service commissioner for the appointment of CEOs; oversight agencies and the coordination of social policy; and enabling the Ombudsman to award compensation.

Reverend Harry Herbert, Secretary of the Uniting Church's Board of Social Responsibility, spoke about participation in government by community representatives. Rather than influencing decisionmaking, serving on advisory committees may sometimes be more important as a means of obtaining information, he said. But governments needed to be clear about the purposes of advisory committees. They should not exist just to provide information, as briefings would service this purpose better.

David Bowen (NSW AG's Department), Amanda Cornwall (PIAC), Judge Kevin O'Connor (President of the ADT), Roger West (former Community Services Commissioner) and Mark Robinson (barrister) explored various aspects of the new rights to reasons for decision and the role of the ADT. Both developments were hailed as the beginning of a new era for improved decisionmaking and accountability in NSW.

Government decisionmakers are now required to provide a statement of reasons that sets out the findings of fact on which the decision is based, the administrator's understanding of the applicable law, and the administrator's reasoning process. This will enable people to know whether the decision was made for proper purposes, taking into account relevant considerations. In addition, decisionmakers will have to do more than cite the law; they will have to provide a view about their interpretation of it.

The ADT's jurisdiction is currently limited to a relatively small number of decisions, but is expected to be expanded over time. The aim is to provide an informal and flexible forum, rather than one that is formalistic, legalistic and adversarial. The advent of the ADT reflects the trend towards large multi-

division or multi-list tribunal structures.

The third sector of the program focused on FOI and access to information. Tony Harris, NSW Auditor-General, provided a sceptical analysis of three types of privilege that block public access to information. In relation to legal professional privilege, Harris suggested that if courts were aware of the frequency with which governments act against the advice of their lawyers, they might come to a different view of protecting discourse between government and their legal advisers from public disclosure.

He also questioned the value accorded to cabinet documents. While cabinet confidentiality enhances the united stance of government, it can also protect weaknesses. Many documents falling under the rubric of cabinet documents do not involve the personal deliberations of ministers but are merely part of the input to their decisions.

"Commercial in confidence" claims are also becoming more prevalent as a way to avoid accountability. Although not all confidentiality claims are invalid, there are many inconsistencies, for example, the claiming of confidentiality where documents are required by Australian law to be in public domain; or where the same documents are published by a U.S. regulator; or where they are provided freely to potential investors. Harris also said that government dealings with the private sector must be open to scrutiny and that if the private sector wishes to avoid this level of scrutiny, it should avoid dealing commercially with government.

Chris Wheeler, Deputy Ombudsman, presented an analysis of the Ombudsman's audit of public sector

compliance with FOI. The audit indicates that agencies appear to be complying well with the letter and spirit of the FOI Act, provided the information contained in the documents requested is non-contentious. But where the information is in any way contentious, it appears that agencies will generally go to considerable lengths to prevent its disclosure. The overall number of FOI applications appears to be declining but this is explained by the adoption of open access policies, where information is released on request without formal application. A significant and increasing number of agencies are failing to comply with FOI annual reporting requirements.

Anne Cossins (UNSW) highlighted the unimpressive past performance of FOI in NSW, which, in its first nine years of operation, has not operated consistently with the objects of attaining openness, responsibility and accountability. A key deficiency was the lack of an affordable and accessible form of external review. Only nine FOI decisions have been handed down by the District Court, most of which ignored the public interest objectives of FOI and case law from other jurisdictions. An important role for the ADT will be to develop a body of case law to assist applicants, agencies and lawyers in the interpretation of the Act.

Tim Robertson, barrister, spoke about the influence of free speech jurisprudence on the interpretation of FOI. With statements from the High Court about the role of information in representative democracy, the interpretation of FOI must be consistent with the constitutional requirement of freedom of communication on government and political matters.

It was the presentation of the story of an ordinary person's quest for access to information

International speakers confirmed for CLC's "Right to Know" conference

The Communications Law Centre and the Australian section of the International Commission of Jurists are holding a conference on "The Community Right to Know and Freedom of Information".

International speakers include John Grace, former Information Commissioner of Canada, Sir Brian Elwood, Chief Ombudsman of New Zealand, and a representative of the Freedom Forum (U.S.).

To be held from August 19-20, 1999 at the Sheraton Towers Hotel in Melbourne, the conference will examine issues such as:

- the right to know and openness in Australia;
- the current state of FOI in Australia and reform proposals;
- the effects of privatisation and contracting out on FOI;
- information access developments in Canada, New Zealand, the U.K., Ireland and the EU;
- FOI and public interest work;
- journalists' use of FOI; and
- review processes.

For more information, contact Jenny Mullaly or Vic Marles on telephone (03) 9248 1278, or email comslaw@dingo.vut.edu.au

that gave "real world" relevance to much of the day's discussion about openness and accountability. Helen Hamilton, a member of the Illawarra Residents Against Toxic Environments, spoke about her community's fight against a government decision to re-open a copper smelter at Port Kembla. Information about the environmental impact of the smelter is essential in order to challenge the government's decision and to substantiate claims about the damage it caused to health, environment and property. The group made an FOI application to the EPA, but was refused access to many documents. They won an appeal to the District Court, with the result that they now have access to information that will play a vital role in their fight against a decision that could affect the quality of many lives.

Linda Morris of the *Sydney Morning Herald* supplied another, less optimistic, user perspective on FOI. From her experience, FOI is cumbersome, time consuming and combative. The *SMH* has been denied information about private tollways, environmental impact statements and the Olympics, and in some cases, has adopted the tactic of seeking to embarrass the government by showing the extent to which information is being withheld. For example, the provision of a letter with all but salutation and closing pleasantries deleted.

While the fault for the poor performance of FOI lies mostly with government and legislators, Morris said that the media have also been complacent. The *SMH* is devising strategies to make better use of FOI, including running appeals in the ADT. ➤

Jenny Mullaly