overwhelm confidentiality arguments. He went on to say, '"unnecessary debate" is a peculiar term in the context of a liberal democracy' and:

> In my view, a major strategic development involving the spending of $40 million of public funding is worthy of debate and wide-ranging discussion, not just of the worthiness of the final proposal, but of all models, submissions, no matter how speculative, leading up to that final decision.

In reply, he was told:

> an identifiable benefit that favours the public release of this information must be shown to be significant enough to override the application of the exemption.[14]

But the Act puts it another way (in s 7):

> A person has a legally enforceable right to be provided, in accordance with this Act, with information contained in records in the possession of an agency or a Minister unless the information is exempt information.

While the wording of the Government's reply to Thomson's application for internal review indicates that the decision not to release documents of significance was made by the FoI Officer, other experiences (such as my own, already described) suggest otherwise.

> *There was generally a ridge or a furrow in her way... Alice soon came to the conclusion that it was a very difficult game indeed.*

Regardless of the delays, unsatisfactory result and expense, Thomson says he is planning to use FoI again — but this time he plans to pursue the FoI Officer more diligently and regularly, and to be less trusting. He said 'There is a lot of secrecy about Intelligent Island but I don't know whether that's peculiar to this program or whether that's normal — whether the [FoI] process is normally this frustrating'.

For Thomson, the failure of FoI to deliver useful information about Intelligent Island has been especially frustrating because none of the board members will comment on the record. Consequently, Tasmanians still don't know what happened to that $40 million.

Thomson, Price and I agree that the delays and unsatisfactory results when using FoI as an investigative tool for journalism in Tasmania does not appear to be the fault of the FoI Officers who process our requests. Suzie Price said. 'it's not so much that I don't trust the FoI Officers but it's more that I don't trust the system as a whole'.[15]

One FoI Officer in particular has processed both of my requests to the Department of Economic Development as well as Thomson's, and she has been nothing but helpful. She has explained what is happening and the reasons, but the ultimate decision appears to be out of her hands.

TAYLOR BILDSTEIN

Taylor Bildstein is a freelance journalist and Masters in Journalism and Media Studies student at the University of Tasmania. She is currently conducting interview-based research with Tasmanian journalists for a thesis that addresses the question 'is FoI an effective investigative tool for journalists in Tasmania?'

Thank you to the postgraduate journalism students who spoke openly and honestly about their experiences using FoI

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Does Australia have the democratic tools required to maintain a healthy democracy?

A speech by Nicola Roxon MP, Labor's Federal Shadow Attorney-General to the Conference honouring Justice Gaudron's contribution to the law Melbourne, 5 March 2004.

Introduction

It is a privilege to be speaking at a conference to honour the work of Justice Mary Gaudron.

I am particularly delighted not only because she has been a towering figure in Australian legal circles for the past three decades (and continues to be on the international stage past her retirement from the High Court), but also because I worked as her associate from late 1992–1994.

For me, like for so many other women in the law, she has been an inspiration from a distance, but also more personally she was a rigorous and demanding taskmaster, preparing me well for the arguments that I now face in my new job as Labor's Federal Shadow Attorney- General.

I was at the Court during a very interesting period — after *Mabo* but before *Wik* — so at a time when there was enormous public debate about the role of the High Court in our democracy. The debate, you will recall focused on the interaction between the parliament and the courts, who should be making

laws and whether the High Court was being too creative, or not creative enough, and/or interventionist in its decisions.

Of course these debates remain a constant, although in varying forms, but it gave me an insight, a unique window, into the limits and frustrations of the Court as an institution unable to participate in the public and media discussion on their decisions, no matter how accurate or inaccurate the debate.

Now that I am a member of parliament I feel especially privileged to have had this bird's eye view of the judiciary. Not many of us get the chance for such a close look at another arm of government. Having worked in courts, and now the parliament, I do confess to a healthy interest in having a better look at the third arm of government — the Executive. I may be accused of having a particular interest that goes beyond my academic interest in the doctrine of the separation of powers, but I will have the leave that judgment up to you!

Theme

I want to consider a number of Justice Gaudron's contributions that focus on the interaction between arms of government, and also between the public, the courts and the parliament. My thesis is that to maintain a healthy, representative democracy we need a range of tools. The 'democratic tools' I intend to explore today are:

1. the issue of standing to bring action against governments
2. the constitutional implied freedom of political communication
3. legislative tools like the *Freedom of Information Act 1982* (Cth).

Any one of these tools alone might not be sufficient to deliver, protect or encourage a strong democracy, but together, and used properly, they can help maintain and strengthen our democratic structures. If we want to renovate or modernise our democracy, we may need tools beyond this as well.

Justice Gaudron's period at the Court gave her the opportunity to identify, develop and use these democratic tools.

Her judgments reveal that she took to this task a strong sense of the need for courts to ensure that executive government was responsive and accountable to the public. She also took an equally strong sense that for people to participate effectively in the good government of the nation, some basic rights and opportunities have to be provided, or at least not be stifled.

I want to use her judgments and comments to invite you to look at government decision-making in a broad context. While it necessarily involves administrative law in a narrow sense as it affects an individual, I invite you to also take a step beyond and to look at broader government decision-making and the level of information provided about it to the public at large.

My personal perspective is that we are entitled to know how government decisions are made — not just whether we can review or appeal them as an individual, but whether access is provided to information that will truly allow a full assessment of decisions. Without information how can we ensure accountability and informed public debate?

1. The doctrine of separation *of powers and standing to bring actions against government*

Justice Gaudron was a vigorous defender of the doctrine of separation of powers. This was reflected in both her administrative and constitutional law judgments.

In administrative law, she emphasised the importance of allowing individuals to hold the executive to account through the judiciary. In particular she has stated that the rule of law requires the courts to preserve whatever remedies it can to ensure that citizens can require the executive to govern according to law.

Let me read you a quote from her judgment in *Corporation of the City of Enfield v Development Assessment Commission* where she deals with the issue of accountability:

> '... [A]ccountability' can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers.
>
> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers.
>
> It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise.
>
> The rule of law requires no less.[1]

It is in this context, and with this flavour to her approach, that Justice Gaudron liberalised the test of standing in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund.*[2] The decision stated that the 'special interest test' should 'be construed as an enabling, not a restrictive, procedural stipulation'.

The effect of her judgment in that case was to extend to many more individuals the right to seek equitable remedies against the executive for acting beyond its power.

Although the facts of the case were unusual, and somewhat complicated the point was made clearly that there was a public interest in preventing ultra vires executive action

> There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction.[3]

hey note in the decision that, in contrast to the UK, in Australia the Attorney-General has a political role. He or she is in charge of a large department, normally a member of Cabinet and not necessarily a lawyer. Given this they state:

> At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.[4]

Her strong and generous approach acknowledging the right of more people to seek judicial review reveals an underlying sense of what is needed to ensure balance & accountability in our system of government — and shows how the Court can help provide that balance by giving citizens the right to take actions against the Executive.

In this way, the courts assist citizens to hold the executive directly accountable for its actions. It also emphasises that there is a public interest, as well as the plaintiff's private interest, to prevent misuse of public authority and money. Standing requirements should not be used as a gate to prevent

courts examining ultra vires action — they should be construed in an 'enabling' not a 'restrictive' manner.

But even with Justice Gaudron's support for a broad interpretation of standing, this assists only in the limited circumstances of a particular case.

A broad interpretation of standing is certainly a handy democratic tool, but one that can only be used for certain jobs. It can only be used to pursue particular action, in particular matters, so it cannot be used in a wide range of areas to enforce accountability.

2. Constitutional implied freedoms

Another tool in the democratic tool kit is the constitutional implied freedom of political communication.

Calling it a tool in this context might be a bit misleading, as it suggests an active role or right. Perhaps the implied freedom should more properly be seen as a protective shield, a negative right which limits parliamentary action that would offend its basic principle.

As the landmark case on 'implied freedoms', *Australian Capital Television v The Commonwealth (ACTV)*, has already been dealt with in some detail by others today, I will focus not on the decision as a whole, but rather Justice Gaudron's carefully and persuasively argued separate judgment in which she supported the majority.

Quoting from her judgment you will notice again, her strong support of our democratic structure. She said that the provisions of the Constitution directing elections for the Houses of Parliament:

> predicate, and in turn, are predicated upon a free society governed in accordance with the principles of representative parliamentary democracy.'[5]
>
> [Accordingly] Representative democracy is a fundamental part of the Constitution — as fundamental as federalism and as fundamental as the vesting of judicial power in an independent federal judiciary.[6]

Importantly, Justice Gaudron's judgment foreshadowed that while a free and representatively democratic society necessarily entailed freedom of political discourse it may also entail 'freedom of movement, freedom of association and, perhaps, freedom of speech generally'.[7]

We see in this acknowledgment, the repeated theme that certain rights and freedoms must be part of our system of government and ensuring our democratic structures work well.

This has been read by many as indicating a preparedness, at least on Justice Gaudron's part, to expand on the scope and content of implied constitutional freedoms in future cases.

Later in *Kruger v Commonwealth* she developed this further:

> It is also settled constitutional doctrine that the system of democratic government for which the Constitution provides depends for its maintenance on freedom of communication and discussion of political matters ..
>
> Those cases do not hold that the freedom is confined to political communications and discussions. Rather, the position is that the Constitution mandates whatever is necessary for the maintenance of the democratic processes for which it provides.
>
> ...
>
> Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement.
>
> ...
>
> As already mentioned, the Commonwealth's power to legislate with respect to the matters specified in s 51 of the Constitution is limited by and subject to the implied freedom of political communication necessary for the maintenance of the system of government for which the Constitution provides. And because freedom of movement and freedom of association are, at least in the respects mentioned, aspects of freedom of political communication, they, too, are implicit in the Constitution and constrain the power conferred by s 51.

These freedoms mentioned by Justice Gaudron are part of what she clearly recognises as the developing tools that might be needed to continue to protect and maintain our democratic structures.

3. Freedom of Information

This brings me to the last democratic tool I want to look at today, the *Freedom of Information Act 1982* (FoI Act).

Of the three tools I have discussed today, this is the one where Justice Gaudron has had the least direct involvement, but it is the one that is now most within my realm to change and where the rationale of the other decisions inevitably leads us to propose reform in this area.

It is intriguing that the High Court decision in the *Australian Capital Television* case was not much more than 10 years ago. Just over 10 years ago, the High Court read into our 100-year-old constitution an implied freedom of political discourse — and found it to be a necessary part of political debate in our representative democracy.

Yet our current use and practice of a 20-year-old FoI Act has effectively allowed governments to obscure and block access to the very information which might make that political discourse of real value.

What value is freedom found to be guaranteed by our constitution if the debate can only be had around facts that the government chooses to selectively release?

Isn't the philosophy of the High Court's decision based on the rights and needs of people to be able to choose their representatives with the fullest information they can? In fact, Justice Gaudron's decision in *Kruger* on the nature of the relationship between political communication and access to information makes reference to this:

> [Of freedom of political communication] It also entails the right to communicate with elected representatives who 'have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to *inform the people* so that they may make informed judgements on relevant matters'. (Quoting Mason CJ from *ACTV*) [8] [Emphasis added]

Of course, it has been made clear by the Court that they do not regard the implied freedom as giving any individual a particular right; rather it is a limitation on governments, and the parliament, which prevents legislative action that would restrict such debate.

So it is clear that we must look to the active rights given under the FoI Act to see if it is the multi-purpose spanner that we need in our democratic tool-kit.

Is it a strong enough and handy enough tool to ensure accountability in a broad range of areas?

In a joint judgment with Justices Gummow and Hayne, Justice Gaudron, *Egan v Willis*[9] referred to modern FoI legislation as a 'supplement' to the operation of responsible government in Australia. Although this was only a passing

comment, it shows that Justice Gaudron considers FoI to play an important role in our democratic system of government.

In my view this 'supplement' is not working. Even a cursory glance at how FoI is currently operating will highlight how the Howard Government has used exemptions in the Act to refuse to provide basic statistical information about the First Home Owners Grant Scheme, the impact of bracket creep and the provisions of significant contracts with privatised immigration detention centre managers, just to name a few.

It will be no surprise to anyone that my job involves following closely, and with great concern, these decisions of the Federal Government. I am acutely aware of the information, or lack of information, that is available to us, as the Opposition, or to the media and the public at large.

In recent times we have been almost embarrassed by the plethora of opportunities for the Opposition to ask — is the Government telling us all they know? Do they have to?

Just consider a few examples:

- children overboard
- weapons of mass destruction
- the details of the US Free trade agreement

So where is this all leading?

It leads me to the question of whether our Executive Government has become obsessed with controlling and restricting information — perhaps to a point where it runs directly counter to the type of free democracy we pride ourselves on having, and that the Court acknowledges as fundamental to our system of democracy.

It is clear that the FOI Act is not the robust, versatile tool our democracy needs. It is more like something you get given at Christmas and don't exactly know how to work. The instructions are not in English and you are not fully confident all the pieces are in the box any way! And it needs to be fixed.

One of my first acts as Shadow Attorney-General was to commit Labor to a review of the FoI Act, starting with a period of consultation of all key stakeholders. We need to ensure the public interest is being put first, not last. Governments rule for public benefit, and should not be able to withhold material as if their reason for being is a private one.

Conclusion

Will the existing tools in our democratic tool kit be able to maintain a solid operating structure for a healthy democracy? As I have outlined, Justice Gaudron took several opportunities to strengthen a range of democratic tools. In fact, she didn't just sharpen the odd democratic implement; she even traded a few for power tools instead!

But there is much to be done from here — and parliament must grasp the need to open up our processes for more public scrutiny. We cannot leave the courts to find all the answers in this area. It is our democracy we will strengthen, and it is our obligation to make sure we do so.

NICOLA ROXON MP

Nicola Roxon is the Federal Shadow Attorney-General.

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3. Ibid, 257.
4. Ibid, 263.
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FoI delays and the use of the deemed refusal

While Freedom of Information (FoI) laws are one of the most powerful tools in the armoury of investigative journalists, sadly Australia's 1982 Act is a blunt and often useless weapon. Widely and wrongly applied exemptions and high costs all contribute to the media's general contempt for the usefulness of FoI but the main issue underpinning endemic disillusionment is extensive delays.

More than for any other FoI users, timely release of information is critical to journalists, and governments understand and manipulate this factor to deter media scrutiny. *The Australian* has embarked on a process that could dramatically lower the delays faced by journalists and has already yielded positive results.

An axiom hammered into almost all journalists is 'you are only as good as your last story'. Journalists are trained to produce daily with relatively few chances for any strategic planning because of the insatiable nature of deadlines.

Each day across newsrooms in Australia, chiefs of staffs and producers are obliged to prepare and present newslists capable of filling the newspaper or broadcast slot with enough copy. While senior journalists understand and appreciate the potential results of long-term investigations, the relentless grind often means potential areas of investigation are put aside to be 'worried about tomorrow', with journalists instead asked what they have for today's newslist.

Every news organisation understands that today's story becomes less relevant day by day — when an FoI application can take years to yield results this makes the process a long-odds punt at best. Take for example the case of *The Australian's* long-standing investigations into levels of bulk billing in Australia. An FoI request lodged last year took the Department of Health and Ageing six months to provide a decision. Typically, the agency was able to find little public interest in the release of information — despite the importance of bulk billing to the health of Australians — ultimately leading to a recently lodged appeal to the Administrative Appeals Tribunal (AAT).

Another case illustrating the lengthy delays in FoI involves *The Australian* newspaper's investigations into oil spills on the Great Barrier Reef. The request lodged in late November 2002, faced interminable delays through the decision making and internal review processes. *The Australian* is still awaiting a decision on access from the AAT following an appeal. Not surprisingly, bureaucrats have decided that release of information about the protection of our most priceless environmental asset from pollution was not in the public interest.