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The constitutional conversation between the Courts and Parliament

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Dr REYNOLDS: It gives me great pleasure to introduce Her Honour Justice Atkinson tonight. We greatly look forward to what you have to say. If you are prepared to take questions and comments afterwards, that would be great. Your comments are being taped and transcribed by Hansard. Thank you very much, Your Honour.

JUSTICE ATKINSON: The topic of my talk, which, as Paul said, I chose, is the Constitutional Conversation between the Courts and Parliament. It is a rather unusual title, and the title comes from an article in the Public Law Review of March 1999 by Associate Professor Hiebert from the Department of Political Studies at Queen's University in Canada. Her article is titled "Why Must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative".[1] Her thesis is that the Canadian Charter of Rights and Freedoms has introduced a new framework for facilitating what she calls "conversations" between Parliaments and courts about the importance that should be attached to citizens' rights and the justification for actions of the State that conflict with protected rights.

In Australia in recent times, particularly after the High Court's decisions in Mabo Queensland (No. 2)[2] and the Wik decision[3], the courts and judges have been subject to unprecedented attacks by parliamentarians. The present paper considers how appropriate communication between the two great institutions in our society can be fostered so that such antagonism can be replaced with mutual respect for each other's proper roles within a democracy. In doing so, I will be drawing on public reactions to Australian, Canadian, British and South African cases to examine the health or otherwise of the relationship between Parliaments and the judiciary.

The notion of a civilised constitutional conversation between the great institutions of our democratic society about the rights of citizens seems eminently sensible. *Citizens, however, and not just in our tall poppy-lopping society, have a healthy disregard for the pretensions of politicians and judges alike. As John Fitzgerald Kennedy is reputed to have said, "Mothers all want their sons to grow up to be President, but they don't want them to become politicians in the process". Perhaps that could now be rephrased as: "Parents all want their children to grow up to be powerful and respected, but they don't want them to become lawyers or politicians in the process".]

In Australia the various organs of government, in particular the Legislature and the judiciary, traditionally show each other wary respect. As in other western democracies, the Parliament passes legislation and the courts endeavour to enforce the law by giving effect to the will of Parliament expressed through that legislation. At times it is not easy to divine what the legislative intention is and various rules for the interpretation of legislation have developed as a result. Often judges will be required to iron out the incompleteness and ambiguities of laws and even inconsistencies between laws.[4] The courts also apply the common law and from time to time anomalies in the common law give rise to what individual judges perceive to be injustice. In those circumstances, in their judgments judges may call for legislative action to correct a common law rule, which apparently gives rise to injustice.[5]

For the most part, courts and Parliaments are very restrained in their dealings with one another. It is in the public exercise of their respective roles that the separation of powers is most clear in Australia's version of the Westminster system. However, one would have to be a hermit not to know of the explosive, even abusive, reaction that members of the Legislature have occasionally had to decisions of courts.[6] By their very nature, courts often find themselves unable to respond to criticism of this type. It is essential to their proper constitutional role that the courts remain depoliticised.

The Commonwealth Attorney-General, after saying in 1997 that Sir Anthony Mason, the former Chief Justice, was ignoring contemporary reality when he asserted that the role of the Attorney-General was to defend the judiciary when it is under attack, has more recently said that while it was appropriate to have public debate on court decisions, it was wrong to attack judges personally.[7] He conceded that sustained political attacks capable of undermining public confidence in the judiciary call for defence by the Attorney-General. He said—

> "Personal attacks against individual judges are likely to undermine public confidence in the judiciary and thereby damage the legitimacy necessary to its effective functioning as the third arm of government."[8]

Of course, tensions of this nature exist in other countries. In the US there has been considerable constitutional tension between the Legislature and the judiciary, particularly over the conflict between the United States Supreme Court's interpretation of constitutional principles and legislative priorities. Within the last fortnight, for example, on 15 May this year, the US Supreme Court invalidated a six year old provision of a Federal law that permitted victims of rape, domestic violence and other crimes "motivated by gender" to sue their attackers in the Federal Court. The court, in a five to four decision in United States v Morrison,[9] struck down the civil remedy provisions of the Violence Against Women Act of 1994. The majority held that the interstate commerce clause of the Constitution was not sufficient to support the statute in question.

While the court had over many years allowed Congress considerable latitude in regulating conduct and transactions under the commerce clause, in 1995 in The United States v Lopez[10] the court expressed the limits on that power. The court held that section 922(q) of the Gun-Free School Zones Act could not be supported under the interstate commerce clause because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms". Similarly the court in Morrison[11] held that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."

The minority opinion, written by Justice Souter, paid explicit respect to the findings of Congress. Passage of the Violence against Women Act in 1994 had been preceded by four years of hearings, which included testimony from medical practitioners and law professors; from survivors of rape and domestic violence; and from representatives of State law enforcement agencies and private business. This testimony led to no fewer than eight separate reports by Congress demonstrating the economic effect of this violence. The annual economic detriment of domestic violence and sexual assault was estimated as being $3 billion in 1990 and $5 billion to $10 billion in 1993. Gender-based violence in the 1990s was shown to operate in a manner similar to racial discrimination in the 1960s in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "gender-based violence bars its most likely targets—women—from full participation in the national economy".[12]

Congress acted after dozens of studies showed that women seeking relief faced considerable obstacles from State judicial systems that regarded sex offences as unworthy of serious attention.[13] Justice Souter predicted that the change in the court's view of the scope of the interstate commerce power would eventually prove as serious a wrong turn for the court as the decisions of the 1930s that, in rejecting elements of the New Deal, provoked the crisis of 1937 when President Roosevelt threatened to stack the US Supreme Court.

The decision to limit the provisions of the Violence Against Women Act drew criticism from senators who had sponsored the law about the appropriate division of power between the courts and the Legislature. These were not personal attacks but a serious response to the question about the respective roles of the two arms of Government. Senator Joseph Biden, the chief Senate sponsor of the Violence Against Women Act, said at a news conference on 15 May 2000[14], as reported in the New York Times, that "this decision is really all about power: who has the power, the court or Congress?" He said there had been a notable improvement in the response of the States to violence against women since Congress put the issue on its agenda in the early 1990s. He predicted the decision would "have a lot less impact on violence against women than on the future role of the United States Congress. The damage done to the Act is not as bad as the damage done to American jurisprudence". Although Senator Biden's criticism was robust, in my view, the manner in which the debate was carried on is a sign of a healthy and free society.[15]

At the other end of the spectrum is the unacceptable, and more often than not inaccurate, personal criticism of judges. An unpleasant example is found in political attacks on certain American judges over their willingness or otherwise to uphold the death penalty fuelled by the popular election of judges in some States.[16] Supreme Court judges in Tennessee, California and Mississippi have lost office as a result of such attacks, which misrepresent the record of the judge or the law. One particularly disgraceful example is that of Justice James Robertson in Mississippi, who lost office after he was attacked for a concurring opinion he had written expressing the view that the Constitution did not permit the death penalty for rape. In doing so, he and his fellow judges were merely upholding their judicial oath. The US Supreme Court had

held 10 years earlier, in Coker v Georgia,[17] that the Eighth Amendment did not permit the death penalty in such cases. This style of political attack on the judiciary has found no place in the Australian political landscape and yet some of the invective against the integrity and intelligence of individual judges and the institution of the High Court of Australia arguably fell into a similar category.

Controversy is not limited to those countries with written constitutions or bills of rights which must be interpreted by the courts. The latest issue of the British Law Quarterly Review[18] commences with a discussion on the limits of the judicial function in that country. This discussion was occasioned by the House of Lords' decision in Fitzpatrick v Sterling Housing Association Ltd[19] which the authors describe as raising "important questions as to the respective functions of the judiciary and the legislature". The House of Lords held that the deceased man's male partner of some 20 years was entitled to succeed to a protected tenancy as a "member of the deceased tenant's family". The authors of the article took the view that this matter, involving as it did questions of changing social attitudes to same-sex relationships, was emphatically not a matter for the courts but for the Parliament. They observed—[20]

> "Few branches of the law more obviously reflect the outcome of conflict between competing economic and political interests than the Rent Acts; few areas of the law are more calculated to arouse strongly divergent feelings than those concerned with the consequences of sexual relationships (although the three majority opinions show little doubt about correctly identifying changes in social attitudes to same-sex relationships). Whether that confidence was securely based or not, there is a powerful reason for regretting the fact that the majority considered the issue of succession rights appropriate for judicial rather than legislative action."

Is there an alternative to this institutional conflict? Not everyone demonstrates the leadership provided by President Nelson Mandela of South Africa. When the Constitutional Court of South Africa struck down a law delegating broad powers to his administration, President Mandela immediately made a public announcement that the court had spoken and its decision must be implemented.[21]

In the context of the debate in Australia about the need or otherwise for a bill of rights—and I understand that you have had that debate in this organisation—and its possible effects on the balance of power between Government and citizen with the judiciary as arbiter, it is interesting to return to some observations of Professor Hiebert in the article I referred to earlier. She suggests that the Canadian experience with its Charter of Rights and Freedoms offers an innovative and useful structure for avoiding political/judicial stalemates.[22] The Charter, she suggests—[23]

> "... by political circumstance rather than genius, provides a framework for resolving institutional disagreements about its interpretation. In doing so, *it] offers an alternative way of thinking about how a bill of rights affects governing. Instead of encouraging a contest between political and judicial wills, the Charter envisages an ongoing and multi-layered constitutional conversation about the scope and meaning of fundamental human rights and on the importance and justification of legislative objectives when these conflict with protected rights."

This constitutional conversation is guaranteed by two aspects of the Canadian Charter. The first is the general limitation clause, which is in section 1 of the Charter and provides—

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The second is the legislative override found in s. 33 of the Charter which provides—

> "33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7-15 of this Charter."

These clauses were essential compromises insisted upon by provincial Governments in return for their support for the Charter.[24] In Hiebert's opinion, the advantage of these clauses is

that "they allow for constitutional conversations about what priorities should be attached to conflicting objectives and rights, which draw from the comparative strengths of both judicial and representative institutions. Arguably, this mode of resolution, which allows for opportunities for institutional disagreement, offers a more balanced system of checks and balances than what exists in some political systems which have opted for, or have avoided, a bill of rights".[25]

This solution is particularly useful because codified rights do not necessarily provide for obvious or non-contentious resolution to rights conflicts. Furthermore, it is legitimate to be concerned about the democratic implications of a small number of non-representative and non-elected judges having the final word on what priorities are to be attached to social values.[26] While the judiciary prides itself on objectiveness and impartiality, there is an equally crucial role for the exercise of political judgment by parliamentarians who are elected for that purpose. The existence and respect for a neutral arbiter of disputes between citizen and citizen, and between citizens and the State, is also essential to the working of a democratic system.[27]

The sophistication of the judicial task and the way in which it must be grounded in an understanding of social and political reality is amply demonstrated in the most recent case on the Charter: Granovsky v Canada (Minister of Employment and Immigration),[28] a decision of the Supreme Court of Canada. The court was considering the constitutionality of a provision of the Canada Pension Plan for persons with temporary disabilities. In doing so, it considered section 15(1) of the Charter which provides that—

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The appellant had been denied the disability pension. The court stated the question before it[29] as being "the pension was properly denied unless the legislation infringes the appellant's equality rights under s.15(1) of the Charter and cannot be saved under s.1". It can therefore be seen that an essential part of the task incorporates a consideration of the general limitation clause in section 1 of the Charter. In paragraph 33 the court said—

> "The Charter is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s 15 of the Charter can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatise the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognise the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied."

The court referred to many outstanding examples of persons with quite severe disabilities who have made extraordinary contributions to society. As they point out,[30] Beethoven was deaf when he composed some of his most enduring works. Franklin Delano Roosevelt, limited to a wheelchair as a result of polio, was the only President of the United States to be elected four times. Terry Fox, who lost a leg to cancer, inspired Canadians by his effort to complete a coast-to-coast marathon even as he raised millions of dollars for cancer research. And Professor Stephen Hawking, struck by amyotrophic lateral sclerosis and unable to communicate without assistance, has nevertheless worked with well-known brilliance as a theoretical physicist.

In a carefully and closely reasoned decision applying tests developed in previous cases on the Charter,[31] and in the context of social reality, the court was able to provide a principled solution to the problem in question. In the end, it was unnecessary to deal with an argument as to the general limitation clause found in section 1 because the court held there was no violation of section 15(1) of the Charter. It was, however, integral to the way in which the initial question was posed.

The two limitations introduced into the Bill of Rights in Canada ensure that the democratic ideal prevails. A significant role is preserved for the political judgment of the Legislature. No single correct answer necessarily exists for the principled resolution of a rights conflict. A legitimate

interpretation of a bill of rights is not necessarily derived exclusively from courts. As Hiebert says, "Rather, it accepts the proposition that a range of acceptable and principled answers may exist and views the resolution of rights conflicts as a joint responsibility of courts and Parliament".[32] She concludes—[33]

> "Debates about adopting a judicially reviewable bill of rights inevitably generate polarised positions with respect to the competence and virtue of Parliament, as contrasted with courts, for evaluating State action from a human rights perspective. But reflection on the Canadian experience with the Charter of Rights allows for a different variation on the debate. The Charter establishes the rights and values that are to be the normative standards for evaluating State action. However, in expressing these, it does not presume that judges are the only institutional actors whose voices are authoritative and legitimate when interpreting and resolving conflicts around rights. The Charter seeks to resolve social and rights conflicts by facilitating conversation between Parliament and courts about the legitimacy of State actions, rather than generating a contest of judicial and political wills. In doing so, it recognises the legitimacy of institutional disagreements."

This gives effect to the mutual respect that Sir Gerard Brennan referred to in the speech which he gave on the occasion of his retirement in 1998 as Chief Justice as—[34]

> "... the mutual respect which the branches of Government must have and demonstrate for the powers and functions of each. Mutual respect is the necessary acknowledgment of the constitutional distribution of powers and the manifesting of mutual respect accords with the expectation of the Australian people."

As the present Chief Justice of Australia, the Honourable Murray Gleeson AC, has similarly observed—[35]

> "The courts and the Parliaments have their own distinctive contributions to make to Justice, and there is no reason why each side cannot continue to maintain a decent regard for the role of the other."

I should now draw to a conclusion. Tacitus, the first century Roman historian, warned that, "Judges are best in the beginning; they deteriorate as time passes".[36] So let me conclude by saying that a constitutional conversation may encourage the Parliament and the judiciary to work in an independent but complementary way as the separate arms of Government. The advantage of a charter is that it sets out the common aspirations of citizens articulated through the political process given effect to by the courts. A "constitutional conversation" between the courts and Legislature ensures that it is the citizens who are supreme rather than either institution which serves them.

Dr REYNOLDS: We have time for questions. Her Honour has very graciously agreed to take questions. That was a very provocative paper, if not very quietly delivered! If you would just identify yourself by name for the transcript and ask the question, that would be great. We can have as much time as we need for that.

Mr HEWITT: I am tempted to reminisce and remind you of a very fiery parliamentarian named Tom Aikens, who used to exploit a breach in Standing Orders at the start of the life of each Parliament. You will know that, quite properly, Parliament cannot criticise or call a judge to account unless what is called a substantive motion is moved, and it needs a very substantial vote in the House before that can happen. In past years, at the start of each Parliament there was that little breach where the old Speaker had gone and the new one had yet to be appointed. The person who presided was the Clerk of the Parliament, who could point to a person and say, "You are the next person to speak." But the Clerk of the Parliament had no authority in terms of limitation of time or content. Aikens used to exploit this breach every three years by attacking the judiciary quite outrageously. Sometimes his speeches would go for an hour and a half. He particularly had a huge dislike for Mr Justice Kneipp, who I think was on the northern circuit. I am pleased to tell you that they are now much more civilised and that breach has been closed.

If I can touch upon one question: in the whole history of Australian Federation and pre-Federation, to the best of my knowledge, only one Supreme Court judge has been dismissed by Parliament, and that happened here in Queensland during the Ahern Premiership. I know of no other. In the last few years, a situation did occur in New South Wales where the House in fact did

vote upon whether a judge should be dismissed on the basis of the poor volume of work. I am pleased to say that the vote was defeated, but, as a consequence of that, as I recall, the Chief Justice in New South Wales became more definitive on the workload of judges and the expectation of judges. I ask the question: with the greatest of respect, seeing that Parliament quite properly does not exert any authority over judges: who really calls judges to account to make sure that the volume of work is done and the veracity of the work? I would assume that is it the Chief Justice in the respective States but, without revealing too many palace secrets, can you tell us something about that relationship?

JUSTICE ATKINSON: Part of the independence of the judiciary is really that each judge is independently responsible. In a sense the judges work as a collegiate body. In Queensland, obviously, we work under the leadership of the Chief Justice. In Queensland the judges have passed a protocol for the time limits for the handing down of judgments, which means that, in the normal course, a judgment will be handed down within three months of hearing, unless there are unusual circumstances. We have also recently passed a protocol for the way in which cases proceed through the court so that they will proceed through the court quickly and in a timely fashion. This has caused a huge culture change. We are now finding that it is practitioners and litigants who have to keep up with the court rather than the other way round. So we are constantly case-managing cases and giving directions to keep cases ready, to keep them moving through the system, because often people for one reason or another might start litigation but be reluctant to continue or a defendant might not want the litigation to go through quickly. So quite often it is the courts that have to actually exert pressure on the litigants and the profession to keep them going.

In answer to your question—the judges, as a collegiate body, meet and make decisions about matters like that, but we work as individuals under the leadership of the Chief Justice.

Dr PRESTON: I think that my friend Bill Hewitt has opened a breach by his question in taking you somewhat beyond the parameters of your fine speech, so I feel free to ask this question. It concerns the independence principle around the judiciary. Bearing in mind your address, can you offer us any views or, indeed, are there any protocols that guide the judiciary in terms of their commentary and their public engagement in the affairs of the day? Your address, I think from the Canadian experience, gives us some wonderful insights into how the legislative interplay may proceed, but away from the bench and on the public rostrum are there any protocols regarding the role of the judiciary to actually engage in politics? Are there any guidelines? Do you have any views on that?

JUSTICE ATKINSON: There is a very fine work written by Justice Jim Thomas, who is a member of the Court of Appeal in Queensland, about judicial ethics, which covers the usual rules for judicial behaviour. I suppose a fundamental rule is that members of courts try to keep out of current political controversies. Obviously, they cannot be members of political parties, and they generally try to keep out of current political controversies. That is not always possible because, in court, you may be dealing with something that is highly controversial. In terms of their out-of-court comments—that is always a subject of debate. Some judges make comments that other judges think go too far. Some judges prefer not to comment on anything as a matter of safety and caution to avoid being drawn into any debate. Others see themselves as having a public duty to do so. I think it is important for people to feel that the judiciary is accessible and accountable, that we are seen in public and that we do speak about issues that we know about, but at the same time keeping out of the party political scene or current political controversies to the best of our ability so that the institution is not politicised.

If I can just talk about Canada for a minute, one of the reasons why the charter was passed was the political will of Pierre Trudeau, who was the Prime Minister, and the intellectual leadership shown by Chief Justice Laskin. So there are certainly—

Dr REYNOLDS: The Act is always important.

JUSTICE ATKINSON: Yes, certainly.

Mr FOURAS: Bill Hewitt has widened the debate. Just a general comment. For 10 years or so now, concern has been expressed by the political arm of the separation of powers that the judiciary is increasingly interpreting parliamentary privilege in a way that allows them to override it in the public interest. In our Parliament, we rely on section 48A of the Constitution Act, which

takes us back to the bill of rights. So there is that concern, that although we are expected to understand the separation of powers, the judiciary sees fit from time to time to make decisions that take away that fundamental privilege of a Parliament that the members can say or do whatever without outside interference if it is said in the Parliament. Do you have a comment to make about that, or are you aware of that debate that is going on?

JUSTICE ATKINSON: Actually, when I was asked about the proper matters for judges to talk about, I should have added that any matter of controversy that may come before you is a matter that you are very wise to refrain from commenting on. I know that that is a matter that has been before the Queensland Supreme Court, and not unlikely to come back. So I think that I will withhold comment on that. I am not trying to duck the question. What I would say is that one of the sources of the tension between the Legislature and the judiciary is that we live under a system of responsible Government, which has traditionally regarded Parliament as supreme, but we also live under a system of constitutional government where the courts are the final arbiter.

It is the Constitution which in fact is supreme rather than the Parliaments, because the Parliaments are under the Constitution and the High Court, in the end, is the final arbiter of the Constitution. There are inherent tensions in the kind of amalgam of the Westminster system that we have developed that has some aspects of the British system and some aspects of the American system. I suspect that there is institutional disagreement between the two arms of Government which will continue and that both will resent the interference of one with the other. I suspect a slight feeling of that kind. I think that both will resent the interference of one in the other, but I think that it is actually part of our system. What I am really asking for in the paper is a way of having that debate so that it is an intelligent and useful conversation rather than just shooting each other from behind the battlements.

Mr FOURAS: Can I just add to that? I am not very well read in things Greek, but I think that Socrates would have referred to this. One of the things that we are lacking as a society is that ability to converse and to seek the truth, which is evasive—to seek the common good. I think there is a lack of conversational ability of people in our society as we are going down the road. I welcome your submission that we should be able to have that conversation. I think that is wonderful, because I think that is ultimately one of the ways that we can find some truths down the road. So I welcome that part of your lecture. Thank you.

JUSTICE ATKINSON: Thank you.

Ms NEWTON: Justice Atkinson, you mentioned the legislative override provision in the Canadian charter—I think it was section 33 of the Canadian charter. I am just interested to know: in your reading, are you aware of how often that has actually been used?

JUSTICE ATKINSON: Yes. It is extremely interesting. It has only been used outside of Quebec once—in Alberta. There was a debate about it being used again. Really, that was so politically unpopular that the Legislature had to back away from it, because these are really rights that the people have agreed to. So there was going to be a huge political cost in using it again. Apart from that, it has been used in Quebec more often, but of course Quebec is a case on its own. In fact, the Quebec Legislature endeavoured to use it in this way: it repealed every Act of the province and endeavoured to put them all back through again with the legislative override of all the charter provisions. That was held to be unconstitutional, but it started a debate about how you would do it so that, if you are going to do it, you have to specify which particular rights you are going to take away and why it is that you are taking away those rights.

Really, it has led to a much more sophisticated political debate among citizens about what they want and whether or not they want it taken away. But it also means that if the courts move too far away from public opinion, or from the opinion of the elected representatives, then the people can say, "No, we don't want that. That is not what we want. We want legislation that changes that." So they can do it, which probably in its own way has an effect on the workings of the court as well. It is probably more the capacity to do it than the fact that it happens that has the effect.

Dr REYNOLDS: I would just like to ask you a hypothetical question—

JUSTICE ATKINSON: I will not fall for that!

Dr REYNOLDS: Don't answer it if you don't have to, or you don't wish to, or it is impossible. The Parliament of Queensland has for some time, as a result of EARC, been deliberating and considering the question of a bill of rights for Queensland. I think it is something that the State jurisdictions around Australia are also grappling with, although heaven knows we have had no resolution about it at the Federal level. That is the background. My question is: if the Queensland Parliament was to adopt a bill of rights as a piece of legislation and if in that legislation it was to be put to referendum and it was passed, would that mean that the Supreme Court of Queensland would act as the High Court of Australia vis-a-vis on the Federal Constitution? In other words, the interpreter and the enforcer of such a State bill of rights would lie with the Supreme Court in that jurisdiction?

JUSTICE ATKINSON: It would depend entirely on what the enforcement provisions were, but that would normally be the case—that the supreme State court would be the interpreter of the rights, given under a bill of rights which is passed by the State Legislature, unless a special tribunal was set up, but that would be unusual. Then, yes, the courts would be the arbiter, which would be why it would be important to keep an objective depoliticised role for the judiciary and why it would be very important then to have a way of conversing about these things so that you did not get the kind of abusive reaction that has occasionally happened in the past.

Mr LIDDELL: This is outside my brief entirely, but as one who was represented by Tom Aikens and who knew Justice Kneipp very well, I do not know what Tom could have found to go on about him for an hour and a half. He was the northern judge for quite some years and a very good judge, too. And he also taught me, so that is another accolade!

Judge, I would like to thank you very warmly indeed for coming along tonight. I am sorry that we have put on such blustery weather for you for such a topical, interesting and erudite address—I cannot think of any other words that might be appropriate. I also thank the people who asked such searching questions. I would ask that you join with me in the normal fashion in thanking the judge very much for coming this evening.

Dr REYNOLDS: Thank you very much, David, and thank you, Your Honour. That concludes the formal part of our evening's proceedings.

1.. (1999) 10 Public Law Review 22.

2.. (1992) 175 CLR 1.

3.. (1996) 187 CLR 1.

4.. Foster, Sir C, "The Encroachment of the Law on Politics" (2000) Parliamentary Affairs 328 at 340.

5.. See, for example, Carlowe v Frigmobile P/L [1999] QCA 527 at [9]; Row v Willtrac Pty Ltd [1999] QSC 359.

6.. Mason, Sir A., "No place in a modern democratic society for a supine judiciary" (1997) 35 (11) Law Society Journal 51.

7.. Lagan, B., "A-G will act to curb attacks against judges" Sydney Morning Herald, 9 December 1998, p 2.

8.. Williams, D., "Judicial Independence and the High Court" (1998) 27 University of Western Australia Law Review 140.

9.. 529 US(2000), 15 May 2000.

10.. 514 US 549 (1995).

11.. (supra).

12.. at p 9.

13.. Greenhouse, L., "Women Lose Right to Sue Attackers in Federal Court" New York Times, 16 May 2000; US v Morrison (supra) at 27-28 per Souter J.

14.. As reported in the New York Times, 16 May 2000.

15.. Attorney-General for New South Wales v Mundey [1972] 2 NSWLR 887 per Hope JA at 908; Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322 at 335 per Lord Atkin; see Chapman, G. "Criticism of Judges, Courts and judicial decisions, especially by politicians" (1995) New Zealand Law Journal 267.

16.. Bright, S. B., "Political Attacks on the Judiciary" (1997) 80(4) Judicature 165.

17.. 433 US 584 (1977).

18.. Cretney, S. and Reynolds, F., "Limits of the Judicial Function" (2000) 116 Law Quarterly Review 181.

19.. [1999] 3 WLR 1113.

20.. (supra) at 184.

21.. Bright (supra) at 173.

22.. Other commentators have suggested that there is grave conflict particularly between the Canadian Provincial Court system and the governments which established them: Seniuk, G., "Judicial Independence and the Supreme Court of Canada" (1998) 77 Canadian Bar Review 381; Re Judges' Reference [1997] 3 SCR 3.

23.. Hiebert (supra) at 23.

24.. Lougheed, R, "Why a notwithstanding clause?" Points of View/Points de vue no. 6 (1998) 1.

25.. Hiebert (supra) at 25.

26.. See Griffith, JAG., "The Brave New World of Sir John Laws" (2000) 63(2) Modern Law Review 159; Gava, J., "The rise of the hero judge" The Australian Financial Review, 14 November 1996, p 21; Enderby, K., "Judges right to go in where politicians fear to tread ..." The Australian, 24 May 1993, p 9.

27.. Lord Steyn, "The Weakest and Least Dangerous Department of Government - The Role of the Judiciary in a Democracy" [1997] Public Law 84.

28.. 2000 SCC 28.

29.. Paragraph 15

30.. at [28].

31.. Rodriguez v British Columbia (Attorney General) [1993] 3 SCR 519; Eaton v Brant County Board of Education [1997] 1 SCR 241; Eldridge v British Columbia (Attorney-General) [1997] 3 SCR 624; Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497.

32.. (supra) at 127.

33.. (supra) at 34.

34.. (1998) 193 CLR v.

35.. Gleeson, A. M, "Legal Oil and Political Vinegar" (1999) 10 Public Law Review 108 at 113.

36.. Annals Bk xv, sec 21.