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THE VICTORIAN FOUNDATION FOR SURVIVORS OF TORTURE

FOUNDATION HOUSE, MELBOURNE

MAX CHARLESWORTH ORATION 2016

TACKLING HARD ETHICAL ISSUES - MAX CHARLESWORTH, BIOETHICS, REFUGEES AND SEXUALITY

The Hon. Michael Kirby AC CMG

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MAX CHARLESWORTH REMEMBERED

Max Charlesworth was one of the foundation professors of Deakin University. His discipline was not law but his expertise often took him into dialogue with lawyers, including me. I shared with him the distinction of being a Patron of Foundation House. It is a precious fact that his widow, Stephanie, and many of his children and grandchildren have attended to witness this tribute to his ongoing contributions to Australian society.

I propose to recount his life's journey. I will then seek to show the relevance of his approach to contentious controversies in the case of the three ethical questions: those concerning bioethical controversies; the treatment of refugee applicants and the issue of same-sex marriage. My

[*] Max Charlesworth Oration 2016, delivered at the Melbourne Town Hall, 13 October 2016.

[**] Justice of the High Court of Australia (1996-2009); Australian Human Rights Medal 1990; Gruber Justice Prize 2011; Patron of the Victorian Foundation for Survivors of Torture.

thesis is that this approach to the resolution of such controversies has relevance for us today. The way we tackle difficult questions is of great importance for finding solutions that will more easily be accepted.

Max Charlesworth was born in country Victoria. He attended the University of Melbourne where, in 1946, he took the BA degree with honours and in 1948 the MA degree. He might have pursued the then classical journey to life as a teacher of philosophy. This would have involved enrolment at one of the universities in England and a pursuit of the linguistic approach to philosophy, so much then favoured in English speaking countries. However, in 1950 he was awarded the Mannix scholarship for Catholic graduates. Max Charlesworth was raised in the Roman Catholic denomination of Christianity. To the end, he was a faithful son of the Church, although in later life he became more critical of some of its teachings. With his scholarship, he proceeded to marry Stephanie. He would have travelled overseas but for a bout of tuberculosis which, for two years, interrupted his plans. His recuperation gave him unexpected time to reflect upon his ethical approaches and priorities.

In 1953, instead of England, he proceeded to Belgium where he enrolled in the University of Louvain, (Leuven), founded in one manifestation in 1425. Its alumni had included Erasmus, a humanist. However, in later years its successor institution was supported by the Catholic Church: a suitable place for the instruction of the holder of the Mannix scholarship.

At Louvain, Max Charlesworth studied for the PhD degree, which he received in 1955 with “grande distinction”. Although keenly interested in philosophy and religion, much of his time was taken up, typically

enough, in studying the contemporary secular philosophy propounded by (amongst others) Sartre and de Beauvoir.

He then accepted appointment at the University of Auckland in 1956. However, like Julius Stone who had preceded him there, he left three years later to take an appointment in Australia. In Charlesworth's case it was as lecturer in philosophy at the University of Melbourne. He remained in this position until 1976.[1]

During this early phase of his life, he became deeply troubled by national and church support for the Vietnam War. Essentially, he was inclined to pacifism and this period in Belgium would have encouraged him in such ideas. In 1970 he became Secretary to a Vatican organisation, the Secretariat for Non-Believers. This was an increasingly suitable place for him as he could increasingly view the Church from that perspective. A period at Notre Dame University in Indiana in the United States further encouraged his embrace of an open and critical approach to the Church as an institution. Yet he remained deeply interested in religion and philosophy. This included the religious beliefs of Australian Aboriginals, which he refused to treat as mere artefacts of an Aboriginal culture. He was increasingly encouraging, pluralist approaches to the study of philosophy. He saw it as critical to explain philosophy in ways appropriate, and necessary, to a modern democratic state.

His move in 1975 took him to the new Deakin University in Melbourne as Inaugural Dean of Humanities. It was at about this time that I came to know him for, in that same year, I was appointed inaugural Chairman of

[1] This biography derives in part from the obituary by Douglas Kirsner published in *The Age* and *Sydney Morning Herald*, 13 June 2014. See also *Who's Who in Australia*, 2011, 446.

the Australian Law Reform Commission. A number of the early projects of that Commission related to bioethical questions. Increasingly, these had become the focus of his work. Thus, in 1983 he joined the Monash Centre for Human Bioethics. Between 1983-93 he served on the Victorian Standing Review and Advisory Committee on infertility. From 1988-91 he was a member of the National Bioethics Consultative Committee. In 1991-93 he served on the Australian Health Ethics Committee. And in 1991-93, he served as a member of the National Health and Medical Research Council of Australia. These appointments were both a reflection of the rapid advances in bioethical issues facing Australia (and the world) at that time. However, they also reflected the high professional reputation and public regard which Max Charlesworth had won for his sensible and understandable expositions of the way that a modern community should approach the many ethical quandaries presented by new technology.

Max Charlesworth and I engaged in many public discussions on ethical issues on the law and specifically the early project that had been assigned to the Law Reform Commission on the Law Concerning *Human Tissue Transplants*.[2] In 1989 he delivered the Boyer Lectures on ABC Radio on the topic *Life, Death, Genes and Ethics*.[3] In 1993 he continued this exploration in an important book *Bioethics in a Liberal Society*. In recognition of his outstanding contributions to philosophy and bioethics he was appointed in 1990 an Officer in the Order of Australia. Although he retired from his chair at Deakin University in 1990, he continued an active engagement with the issues that he had made his own. He served as Director of the National Institute for Law,

[2] Australian Law Reform Commission, *Human Tissue Transplants* (ALRC 7), 1977.
[3] Australian Broadcasting Corporation, Sydney, (1989).

Ethics and Public Affairs (1993-94). He wrote a popular book *Philosophy for Beginners* in 2007. He continued to urge ideas about contemporary philosophy that had constituted the main themes of his professional and public life:

- To acknowledge the pluralist approach that is essential if citizens are to live together in a modern secular community;
- To retain a generosity of spirit and good humour, avoiding hostility to, and attacks on, the views of others that were different from his own approach;
- To be familiar with all major religious traditions, but to remain critical and questioning of them, rejecting institutional dogmatism; and
- To try to make a difference, and to help, contemporary societies, turning philosophy and ethical dialogue into practical utility without purporting to present instant solutions to all problems.

It is my thesis that these elements in the approach of Max Charlesworth to philosophy and ethics were not only useful to governments and law reform bodies, like my own. They were particularly useful to the world he came to know in his last years. The refusal to accommodate other points of view was, for Charlesworth, not only institutionally damaging to society and religion. It was also inappropriate to philosophy, at least where it was called upon to address the acute ethical and practical controversies of the present age.

BIOETHICS

It was in bioethics, specifically as it related to biotechnology, that I had the most frequent connections with Max Charlesworth. Often these were because of tasks that were being undertaken by the Australian Law Reform Commission. Some of those tasks coincided with his time as a university teacher of philosophy. Clearest amongst these was the project on new technology of tissue transplantation.[4] But there were other projects where we sought his help, including those on the recognition of the rights of children;[5] the recognition of Aboriginal customary laws;[6] and many problems presented for the defence of individual privacy by the rapid developments in technologies of informatics, listening devises and tracking devices.[7] In projects that occupied the Commission after my service, a number dealt with the legal implications of genomics.[8]

The reference to the Law Reform Commission on *Human Tissue Transplants* was assigned in 1976 by the Attorney-General in the Fraser Government, Robert Ellicott QC. The project raised questions concerning what the law said, or should say, upon issues presenting at the beginning, and at the end, of human life. These were the *termini* that were of great concern to Max Charlesworth's church, because of its teachings about the issues of abortion and euthanasia. Some aspects of these issues were raised by the scope of the Commission's reference.

[4] See ALRC 7, n2 above.
[5] Australian Law Reform Commission, *Child Welfare* (ALRC 18) 1981.
[6] Australian Law Reform Commission, *Aboriginal Customary Laws* (ALRC 31), 1981.
[7] Australian Law Reform Commission, *Privacy* (ALRC 22) 1983.
[8] Australian Law Reform Commission, *Genes and Ingenuity, Gene Patenting and Human Health* (ALRC 99) 2004.

Thus, *birth* was presented by the advances in technology immediately prior to the Commission's project, by which infertile couples were assisted to overcome physical impediments to conception; yet a married woman using such technologies was condemned as engaging in an illicit form of assisted adultery. Even where the sperm used was secured from the husband to a marriage, the interposition of technology to enhance the chances of conception was condemned by some theologians and ethicists as incompatible with the 'order of nature'. Somewhat heartlessly, at the time, theologians were insisting that, if a couple were infertile, they should simply accept that fact and remember Christ's suffering when enduring their own. Such arguments were generally given short shrift by witnesses and experts at public consultations conducted by the Law Reform Commission. Nor did they enjoy much support from Max Charlesworth, whose marriage had been blessed with five daughters and two sons. Far from making him antagonistic or indifferent to the desires of other couples, his life made him understanding of their wishes for children of their own.

In the course of undertaking the project on *Human Tissue Transplants*, the Commission became aware of a technology which was them becoming available to permit in vitro fertilisation, which was an advance upon the old technique of artificial insemination (AID and AIH). The question arose as to whether IVF was but a new form of tissue transplantation. Whilst referring to the new technology, which had many pioneers in Australia, specifically in Melbourne,[9] the Commission considered that distinctive ethical questions were presented which would require a separate reference, if the Government wanted a law reform

[9] Under the leadership at Monash University of Professor Carl Wood AC, CBE and Dr Alan Trounson (now California Institute for Regenerative Medicine).

report on the topic.[10] With help from Max Charlesworth and many others, the Commission produced a report that was implemented and copied throughout Australia and overseas. It demonstrated that controversial topics could be addressed with care and sensitivity, so long as appropriate procedures were followed and expert guidance was procured.

On the subject of health and the end of life, this was also a topic that arose in the Transplantation project. This was because, for some vital organs, it was only feasible to procure them from human cadavers and therefore necessary to define in the law the condition of "death", so as to prevent and sanction premature harvesting of organs. The Commission had to tackle whether a regime of opting in or opting out should be adopted; how donations could be facilitated; and whether a person's donation of his or her body for dissection following death could be over ruled by the family.

In these and other issues, it was of enormous help to the Commission to have the thoughts of Max Charlesworth to guide us. A sample of his wise and practical reasoning was included by the then chairman of the ABC, Donald McDonald, in a survey of the *Boyer Lectures* that he published in 2003.[11] His survey included the writings by Max Charlesworth alongside some of the finest Australian biologists, Sir John Eccles, Sir Macfarlane Burnet and Sir Gustav Nossal. Whilst each of the scientists tackled aspects of ethics, it was Max Charlesworth who led the Australian listeners into the engine room of law and public policy.

[10] ALRC 7, above n2 at 46 [105].
[11] Donald McDonald, *Highlights of the Boyer Collection*, ABC, Sydney, 2001 in the IVth Program, *Bioethics and Medical Research*.

A further topic that he tackled was euthanasia: whether the law should permit a person in certain circumstances to receive medical, nursing and other assistance to end his or her own life, and if so under what conditions. Such laws had already begun to appear overseas, even in 1989, when Charlesworth delivered his lectures, notably in the Netherlands. He faced squarely the suggestion that drawing a distinction between *active* euthanasia and passive hospice care was artificial and unreasonable:[12]

> *"*Despite all the rational arguments showing that there's no absolute distinction between actively bringing about a person's death and passively letting the patient die, and despite the fact that our society has a very selective view of the value of human life, there was still grave reservations about sanctioning any form of so-called active euthanasia or the taking of a patient's life, even when the patient seriously requests it. … [E]ven in Holland there's been a good deal of resistance to changing the law.
>
> However, this leaves physicians in a difficult situation, since if they accede to a request from a patient to cease routine treatment, or to help her to die, they may very well, under present laws, be charged with manslaughter. As a recent discussion paper of the National Health and Medical Research Council puts it, 'what we have at the moment are horse-and-cart laws for space-age medicine'… One's death is, in a very real sense, the most momentous act of one's life. And it's important that it be as human an event as possible. That means, in turn, taking the rights of the patient seriously. As a French biologist has recently argued, physicians have, first and above all, to respect the rights of the patients in

[12] M. Charlesworth, "Life, Death, Genes and Ethics: Biotechnology and Bioethics" (1989).

> their charge. But among those rights they must take into consideration the right to not undergo certain kinds of treatment, when the price to be paid appears too heavy, vis a vie the likely results. What does the prolongation of a person's biological life mean if it is obtained at the cost of a serious assault on that person's liberty?

This is a classical passage from Max Charlesworth evidencing his technique and analysis. Calm scrutiny of the issues. Reflection of purely linguistic solutions that will satisfy no one. Addressing the practicalities both in human and social terms. And retaining compassion and understanding for the people who are central to the ethical dilemma in question.

I wish I could say, that in the intervening years since 1989, we have fully resolved the questions that Max Charlesworth unbundled in his *Boyer Lectures*. Even in contemporary newspapers, there are reports of continuing challenges of some of the bioethical issues I have mentioned, including euthanasia. Four attempts have been made in Australia to introduce specific legislation to legalise assisted death in defined circumstances. A law enacted in the Northern Territory was disallowed, exceptionally, by the Howard Government. The Federal Parliament overrode the law on 'moral' grounds and it has not been reintroduced. Legislation in Tasmania narrowly failed to pass in 2013 by a conscience vote. At the present time, Bills are under consideration both in the Victorian Parliament[13] and in the Parliament of South Australia.[14]

[13] Victoria Legislative Council, End of Life Choices Inquiry, *Final Report*, 2016. The *Medical Treatment Act* 1988 (Vic) expressly provided for patients to refuse medical treatment.

[14] South Australia, Ending Life with Dignity Bill 2013 (SA). An earlier Bill in 2009 was defeated in the South Australian Legislative Council (11-9). In November 2016 the South Australia Bill was defeated on the casting vote of the presiding officer in the SA Legislative Assembly.

According to media reports, the Victorian Bill is said likely to "take an anticipated two years to be considered by the [S]tate [P]arliament.[15]

According to news reports, the chief controversy in South Australia concerned the removal of a precondition, common in much such legislation, that the person seeking medical assistance to terminate life should be able to demonstrate that he or she is suffering from 'a terminal medical condition'. The South Australian Bill was co-sponsored by Ms Steph Key (ALP) and Mr Duncan McFetridge (Liberal). It does not contain a precondition of imminent death. Reportedly, it enjoyed the support of the Premier of South Australia (Hon. Jay Weatherill) and the State Liberal Leader (Mr Steven Marshall), both of whom support a conscience vote. Whilst News Limited generally take a consistent and hostile view on such topics, it appears probable that the adoption of such a law in one of the States of Australia will come sooner rather than later.

Occasionally, to outsiders, News Limited appears to be expounding a specific conservative or religious position and one sometimes wonders who directs its policies in such matters. Advocates and opponents of such legislation would be well advised to read as well what Max Charlesworth wrote on end of life decisions. He was cautious in such matters; but by no means dogmatic. And his approach to them was marked by a calm, wise and compassionate empathy for those who face such questions in practice and the family members who are close to them. As he would point out, advances in end of life care, and the administration of new painkilling therapies, have reduced cases of

[15] *The Australian*, 13 October 2016, 3 (James Walker, "Imminent Death" 'not a factor').

prolonged and intolerable pain. But not entirely. And pain itself may not be the only criterion to be considered in such cases.[16]

REFUGEES, *DETENTION AND 'WAREHOUSING'*

Max Charlesworth's engagement with Foundation House would not have occurred if he had been indifferent to the issues of refugees and displaced persons in the world today. The total numbers who presently fall into this category are estimated at 55 million persons. Against this huge global catastrophe, the number of refugee applicants whom Australia receives may be large when compared with other western countries. But it is hardly more than a drop in the ocean so far as the global challenge to human conscience and generosity is enlivened.

A particular challenge that has arisen in Australia has been the policy, adopted under successive federal governments of different political compositions, of establishing off-shore processing centres for those who have tried to come to Australia on boats. They are diverted to these overseas centres to have their claims assessed. Such processing is currently provided on Manus Island in Papua New Guinea and also in Nauru. The facility at Manus Island, and the arrangements between the governments of Papua New Guinea and Australia for that purpose have been declared unconstitutional by a judgment of the Papua New Guinea National Court. The conditions of refugees in each of these off-shore processing facilities appear to be seriously defective. They have been strongly criticised by United Nations and non-governmental

[16] Proponents of the South Australian Bill argue that in some cases, e.g. Motor Neurone Disease, Huntington's disease or advanced stage Parkinson's disease 'these people are in a very difficult situation… not everybody wants to [continue on as long as they can]. They need to eligible. When they have got to a stage when they have had enough", *The Australian,* 13 October 2016, 3.

organisations.[17] The latter have included Foundation House.[18] They have also been criticised by the Australian Human Rights Commission[19] and by United Nations bodies.[20]

It is not my purpose to analyse, or assess, the criticisms that have been made or the assertion that the conditions in offshore facilities are intolerable and themselves an affront to Australia's legal and ethical duties to people, including children, who have sought asylum from us.

I believe that if Max Charlesworth were commenting, in contemporary circumstances, upon the conditions of refugee applicants in off-shore processing centres, he would make at least a number of powerful points:

- That it does not appear that a national strategy of diverting refugee applicants is compatible with international law providing the legal obligations that Australia has assumed under the *Refugees Convention and Protocol*; [21]
- That, to the extent that Australia instituted, funds, supports and promotes such off-shore 'processing', it has both legal obligations in international law and moral duties as a nation to ensure that the processing is carried out efficiently, speedily and transparently so that those involved are not objectified or merely used as a

[17] Elaine Pearson, "Australia's Harsh Refugee Policy is no Global Model", published in *Washington Post*, 19 September 2016 and online.
[18] See Paris Aristotle, "Sustainable rehabilitation for survivors and their communities" Bob Hawke Prime Ministerial Centre, Adelaide, 8 June 2016; Foundation House, "Statement regarding people transferred by Australia to Papua New Guinea & Nauru – September 2016 (2 September 2016).
[19] In AHRC report *The Forgotten Children* (Sydney, 2014).
[20] United Nations, Committee on the Rights of the Child, Geneva, 7 October 2016.
[21] *United Nations Convention on the Rights of the Child*, art 37(b). See discussion in *Minister for Immigration and Multi-Cultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 417 [144]-[155]; [2004] HCA 20. Cf (2011) 244 CLR 144.

deterrent to discourage or prevent others from seeking asylum in this way from Australia;

- That the duty of ensuring 'processing' efficiently particularly incumbent on Australia in the case of children because of their own special vulnerabilities and because of Australia's ratification of the *Convention on the Rights of the Child* which makes the detention of children a 'last resort' in any legal system;[22] and
- That proper facilities should be made available to ensure that persons being 'processed' in detention can be advised, in a language which they can understand and with appropriate assistance, how they can accurately complete their application for refugee status to expedite and conclude the assessment process. The provision of advice in the English language only and the cancellation of free publicly-provided legal and other assistance also raises ethical questions and Kafka-like administrative predicaments for such people that are often unseemly and intolerable.

The current cost of providing for detainees as we have been doing has been estimated at $1 million per person per year.[23] Even if this is an overestimate, the cost is certainly extremely high. Humanity, if not economy, requires that it be terminated as swiftly and efficiently as possible. Quite apart from the challenges to the off-shore processing arrangements introduced by Australia, brought in courts of the countries concerned, others have been initiated in Australian courts, including the High Court of Australia. The attempt by the Rudd and Gillard Governments to provide for off-shore processing in Malaysia (which did

[22] Loc cit.
[23] A point made by Human Rights Watch, Elaine Pearson, above n17 "… [T]hese policies are incredibly costly – roughly 1 million Australian dollars (US$754,000) per detainee on Manus each year."

not recognise the status of refugees in its law and did not undertake any activities to determine claimants who were asylum seekers and refugees with admissible entitlement under Australian law) was invalidated, by majority in the High Court of Australia.[24] That Court held that it was a presupposition of the Australian law, providing for such an offshore facility, that the relevant country would be subject to a domestic or international legal obligation to provide the access described and secure protections of the kinds envisaged under the Australian statute. Challenges in the High Court of Australia to the off-shore processing in Papua New Guinea and Nauru have not so far been equally successful.

Nevertheless, in one of the most recent decisions of the High Court of Australia, dealing with the statutory and constitutional validity of off-shore processing, suggestions have been made in both minority and dissenting opinions, that a point will be reached where off-shore processing will present problems from an Australian legal point of view. This was an issue that was raised in *Plaintiff M68/2015 v Minister for Immigration and Border Protection.*[25] That was a challenge to the legality of the proposal of the Commonwealth to return to Nauru an asylum seeker who had earlier been transferred there without her consent when she was seeking to gain access to Australia in order to seek from it protection in accordance in the *Refugees Convention and Protocol*. The woman, a Bangladeshi national, had been taken into custody at sea on a boat heading for Australia. She was intercepted and sent to Nauru for 'processing'. She was later removed from Nauru to a hospital in Australia to give birth to a child and to receive medical treatment. She sought relief to restrain any steps to return her to Nauru.

[24] *Plaintiff M70/2011 v Minister for Immigration* (*Malaysian Declaration Case*) (2011) 244 CLR 144; [2011] HCA 32.
[25](2016) 90 ALJR 297; [2016] HCA 1.

Many questions were raised in this litigation. Ultimately, amongst these, a critical question arose as to whether the provisions of the Australian *Migration Act* applied to the case and, if it did, whether the challenged decisions were constitutionally valid. Clearly the actions of Australian officials in imposing restraints upon the liberty of persons like the applicant attracted the usual principle that imposition of restraints on liberty required specific authority of law. Although Australia contested that the applicant was detained on Nauru pursuant to Australian law (rather than Nauruan law), three Justices objected to the contention for the Commonwealth that the constraints of Australian law were severed once a claimant had arrived on Nauru. Although four members of the Court held that the detention in custody on Nauru was ultimately sustained pursuant to the law of Nauru, it is clear that this is a contestable proposition. It is one that may at some time in the future encounter a shifting majority (at present 4:3). Classification of the source of constraint for legal purposes raises a legal question, but also a moral and ethical one.

Constitutional reasons led Justice Gordon in the High Court to dissent from the rejection of the claimant's challenge. In the way in which Her Honour approached the matter, these concerned, whether the long-term detention on Nauru was compatible with the boundary imposed upon Australian executive governmental action to impose restraint on the liberty of an alien in a regional processing country. As Justice Gordon pointed out:[26]

[26] *Ibid* at 364 [408].

> "The power… is subject to the limitations and prohibitions in the Constitution. It is bounded by Ch III. That includes the *Lim* limitation."[27]

The *Lim* limitation referred to arises from an earlier decision of the High Court of Australia. This in turn was explained succinctly in *Plaintiff M76/2013 v Minister for Immigration, Multi-Cultural Affairs and Citizenship:*[28]

> "[L]aws authorising or requiring the detention in custody by the executive of non-citizens, being laws with the respect to aliens within s51(xix) of the *Constitution*, will not contravene Ch III of the *Constitution*, and will therefore be valid, *only* if: "the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."

Justice Gordon concluded that the statutory provision relied on by the Australian Government in the case of *Plaintiff M68/2015* was constitutionally invalid. She said that this was:

> "Because it "contravene[s] Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates." It does that because it restricts liberty otherwise than by judicial order and beyond the limits of those few and confined exceptional cases where the Executive, without judicial process, can detain a person. … The aliens power… does not authorise that kind of

[27] A reference to *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 57.
[28] (2013) 251 CLR 322 at [138]; [2013] HCA 53.

> law because the involuntary detention of persons at the behest of the Executive is permitted only in exceptional circumstances. … And a new exception should not be created for this kind of detention."

If regard is had to the already prolonged and continuing detention of considerable numbers of persons on Nauru on the basis of decisions of the Executive Government of Australia for such a significant time (and one might add in such arduous, often dangerous and inhumane conditions) a point will be reached where the purported "detention" must be categorised as a form of "imprisonment" determined by the Executive. Certainly, at that point in time, the absence of a judicial order authorising such restraints on liberty will be fatal to their constitutional validity.

Of course, Justice Gordon's opinion was a dissenting one. However, such opinions can influence the future course of reasoning. It is not heterodox to the past authority of the High Court of Australia. On the contrary, it is anchored in the earlier decision of *Lim*, and High Court authorities that have followed it.

If the conditions of detention of Australia's asylum seekers in off-shore processing facilities persist, and if this system is not corrected (as I would hope) by more humane Australian legislation that conforms to international law, it is reasonable to suggest that the courts should intervene to uphold the constitutional norm earlier expressed in *Lim*. This is not legal heterodoxy. It is orthodoxy.

The approach favoured by Justice Gordon does not involve, as such, an appeal to ethical and moral arguments. However, it does involve

appeals voiced in the calm reasoning of the judges, founded on ancient principles of liberty that identify protections sourced in the separation of powers doctrine found in the Australian Constitution. I believe that as a matter of ethics, Max Charlesworth would embrace the *Lim* principle stated as a matter of law. He wold add ethical reasoning to support the legal. The experience of civilized states has long taught the wisdom of subjecting impositions on human liberty by the committed Executive branch of government, the assessment and scrutinising of the independent judicial branch of government that alone should be vested with the power of detention that lasts more than a short interval of time.

SEXUALITY

These comments bring me to the third and final issue upon which it is relevant, in effect, to ask what Max Charlesworth would say about a current ethical quandary. I refer to the question where the *Marriage Act* 1961 (Cth) should be amended to provide for the opening up of marriage to same-sex couples.

So far as I am aware, Max Charlesworth never wrote on this subject. For most of his life it was a topic that was not raised in public debate. For a good part of his life that was for the understandable reason that the criminal laws throughout Australia, imposed severe sanctions on the conduct of people attracted to their own sex as a result of their sexual orientation or gender identity. At that time, the idea of legal relationship recognition was unthinkable. Only when the criminal laws were

abolished did the possibility of recognition open up. In Australia, the last of the criminal laws was repealed in Tasmania in 1997.[29]

Because of his upbringing in the Catholic Church, Max Charlesworth might have initially been unsympathetic to the idea of same-sex marriage. However, many things are now happening, both within and outside the Christian churches. Pope Francis himself, soon after his election to the Papacy, began expressing a greater open-mindedness about sexual minorities.[30] And in any case, Max Charlesworth, particularly in his later years, was by no means uncritical of church positions on such topics.

So would Max Charlesworth have reacted to the proposal of a plebiscite as a precondition to the enactment of gay marriage in Australia? What would have been his guidance on that topic and homosexual law reform in general? I have not found any writing of his on the subject; but based on is modes of analysis of issues, I suspect that he would have proceeded along the following lines:

* The issues have to be resolved in the context of a liberal democratic state;
* The resolution could not be simply follow unquestioningly the command of religious institutions or leaders, given the secular

[29] *Criminal Code Act* 1924 (Tas), s122. See also *Croome v Tasmania* (1997) 191 CLR 119 at 123.
[30] See Joshua J McElwee "Francis Explains 'Who am I to Judge?' in *National Catholic Reporter* 10 January 2016. Reply appears in a book *The Name of God is Mercy* (Vatican, Rome, January 2016). During a visit to the United States in September 2016, at the Vatican Embassy in Washington DC, Pope Francis met and embraced a friend Yayo Grassi an openly gay man, accompanied by his partner Iwan Bagus and other friends in an encounter filmed and broadcast. C. Burke (CNN Religious Editor), "CNN exclusive: Pope Held Private Meeting with Same-Sex Couple in US", 3 October 2015.

character of the state in Australia and the shifting spiritual and philosophical allegiances of its people;

- Debates on such issues should be conducted in a calm and mutually respectful way, so far as this was possible given the strong emotional feelings that many people felt about them;
- Care should be taken by political leaders to avoid either unguided populist solutions or inevitabilist capitulation;
- The methodology of achieving change in such matters is itself important. Time alone would sometimes give opponents the opportunity to adjust their thinking to the idea of change. This had happened earlier with divorce law reform, homosexual offence reform and the provision of reproductive technology; and
- Mutual respect for those with antagonistic views should be encouraged. The language of hatred and unyielding hostility should be discouraged. Triumphalism and the claim of a monopoly on ethical wisdom should be shown up for the error it usually entailed.

Unfortunately, the debates in Australia on legal recognition on same-sex relationships have strayed quite a distance from these ideals. Opponents of laws for the opening up of marriage to same-sex couples in Parliament have rejected the normal solution that we have adopted in Australia: a conscience vote in the legislature that respects the integrity of advocates on both sides. Instead, an exceptional stratagem has been proposed: the conduct of a national plebiscite.[31]

[31] The Plebiscite was proposed by Hon. Tony Abbott, however, News Poll and Essential Poll in mid-September 2016 showed strong a preference amongst Australian electors for a vote in Parliament.

Presumably a plebiscite was suggested to attract the notoriously cautious record that Australian electors have shown in agreeing to referendums proposing constitutional change.[32] The last substantive plebiscites in Australia on a federal legal issue were held in 1916 and 1917, a century ago, on the topic of compulsory military conscription. Both plebiscites were lost.[33] In the case of same-sex marriage, a referendum is unnecessary as a prerequisite to legislation. In 2013, the High Court of Australia unanimously held that the legislative power for that purpose exists, and only exists, in the Federal Parliament, assuming that the political will exists.[34] Plebiscites have not earlier been invoked, as an extra constitutional requirement, for federal law reform in Australia when the basic civil rights of Aboriginals, women, people of colour and disabled persons were enlarged. Had a plebiscite been taken on such issues, especially the abolition of 'White Australia' or, say, the abolition of the death penalty, it is unlikely that the law would have been changed.[35]

Max Charlesworth, I believe, would have insisted that the methodology of tackling social questions with an ethical content, was itself important. Most of all, he would have been destressed by the hostility, denigration and vituperation of much of the current Australian debate on this topic. And by the bias shown in some media outlets in their presentation of

[32] In 115 years of Federation, there have been 44 referendum proposals in accordance with s128 of the *Australian Constitution*. Only 8 have succeeded. See A.J. Blackshield and G. Williams, *Australian Constitutional Law: Law & Theory* (6th ed., 2014, 1339 [30.5].

[33] In November 1916 a plebiscite was conducted by the first W.M. Hughes ministry (ALP). It resulted in a defeat with the majority of electors nationwide (and in Queensland, New South Wales and South Australia) voting against the proposal. The resulting split in the ALP and formation of the National Labor Party and Commonwealth Liberal Party resulted in the resubmission of a second referendum in December 1917 with a modified proposal involving contingent use of ballots. This also failed to secure national majority. It was rejected in New South Wales, Victoria, Queensland and South Australia. See J. Connor, *ANZAC and Empire*, Cambridge Uni Press, 2011, 107.

[34] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 459 [23]; [2013] HCA 55.

[35] Discussed in M.D. Kirby, "Dr George Ian Duncan Remembered" (2016) 37 *Adelaide Law Review* 1 at 9-10.

news and opinion favouring particular outcomes.[36] It has long been part of the wisdom of the approach of English-speaking countries in tackling sensitive questions of law reform and change, to observe long established procedures. Out of settled procedures and the avoidance of exceptional strategies it is more likely that wise and acceptable outcomes will be reached.

CONCLUSION

This is the essential lesson about the resolution of divisive ethical questions in Australian society that we should keep in our minds when we remember Max Charlesworth. His calm, undogmatic and respectful analysis of issues is much needed in Australia today because it is increasingly absent from contemporary public discourse.

I am glad that my professional life intersected with that of Max Charlesworth. I am proud that I shared with him a long connection with Foundation House. We did not always agree on the resolution of issues. But we never doubted the integrity of each other's viewpoints. We strongly concurred in the importance of calm dialogue and mutual respect. For these gifts to the Australian community, afforded over so many years, it is right that we gather once again to remember the life, and celebrate the work, of Maxwell John Charlesworth: Australian philosopher, ethicist and public intellectual.

[36] For comment on a decision raising similar questions concerning the separation of powers in Australia see J.L Eldridge, 'Paperless Arrests': *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 236 ALR 16; (2016) 37 *Adelaide Law Review* 283 at 289. A case note on the case reported (2015) 90 ALJR 38; A reference to the decision is: (2015) 90 ALJR 38; [2015] HCA 41. See esp. Gaegeler J *ibid* at 69 [129]-[135].