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The Movement of People and Asylum Seekers in the Asia Pacific: A Rule of Law Approach

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- Acknowledge traditional custodians of the land.

- Chief Justice, Members of the Committee for Women Lawyers, distinguished guests, especially Helen, Shirley Smith's daughter.

- I am honoured to give the Shirley Smith oration. Over the last few days I have learned about Shirley's exceptional contribution to the law and her commitment to social justice for the most vulnerable New Zealanders. I especially admire her work as a single practitioner who took on cases that were often *pro bono* or badly paid, acting for some of the most marginalised people. Shirley was instrumental in establishing the Human Rights Organisation and the New Zealand Council for Civil Liberties.

- I was interested to learn that I do have one thing in common with Shirley as I understand that she was somewhat notorious in the legal community as legal counsel for gangs including the so-called "Mongrel Mob'. Similarly, at the AHRC, As President of the AHRC, I along with my colleagues, drew attention to the anti-bikie laws in Queensland that on the basis of mere "association" with an outlawed bikie gang can attract mandatory prison sentences of 25years or more. Indeed, Shirley's courageous work is relevant today, when so many New Zealanders living in Australia are vulnerable to having their visas cancelled and deportation; deportations that are a symptom of the expansion of executive powers in Australia that pose a threat to the rule of law in our democracy.

- Above all, Shirley called on us to treat everyone with respect: to quote her, "*everyone should have the benefit of the doubt, no matter what they look like, there is a human being in there."*

- Her message is especially important today in responding to my topic this evening: the movement of peoples and asylum seekers in the Asian region and the rule of law.

In considering the challenges posed by the movement of peoples and asylum seekers, I would like to place the issue in its global context, before moving to the Asian region and then to Australia's exceptionalism in failing to protect human rights, in the specific context of the cooling in relations between Australia and New Zealand arising from recent visa cancellations and deportations of New Zealand citizens.

Firstly, we need to acknowledge the global phenomenon of the movement of peoples and of asylum seekers and refugees. The UN estimates that by the end of 2017, there are 68.5 million displaced persons, including 25.4 million refugees-– a record high- a result of persecution, conflict and violence; and an unprecedented human tragedy that demands a global, regional and national response. Perhaps most shockingly, these numbers have increased over the last year by 16.2 million newly displaced persons; 85% of them hosted by some of the poorest developing countries (Turkey, 3.5m; Pakistan, 1.4 m Uganda, Lebanon, Iran, Germany, nearly 1m Bangladesh 1m and Sudan 1m).

In citing these statistics, I am reminded of the link the United Nations Charter made in 1945, after the horrors of the Second World war, the preambular principles that world peace depends on respect for human rights; that civil and international conflict almost invariably arise from human rights violations; they go hand in hand. We need to work to protect human rights as a foundation for global peace and security.

Globally, over 3.1 million people are awaiting a decision on applications for asylum, so they live many years -some for decades-in a legal twilight zone in which they have few rights or protections as citizens. 68% of all refugees come from a small number of countries; Syria, Afghanistan, South Sudan, and Somalia.

While overwhelmingly, most claims to asylum are made to the US, most refugees are in reality granted asylum by Turkey, Bangladesh, Sudan, Uganda, Dem Rep. Congo, Ethiopia, Cameroon, Angola, Tanzania; despite their claims to the contrary, western nations grant asylum to relatively few refugees.

Most shocking of all these facts is that 52% of all the refugee population are children below the age of 18.

Statelessness

In reciting these facts, you may have noted that our region -South East Asia and the Pacific - does not figure significantly. This is, however, changing as a direct consequence of the failure to accord citizenship to those born within a nation. Statelessness has become a major source of the movement of people in our region.

One of the most desperate populations is the Rohingya, a Muslim minority originating in Burma where the Rohingya are denied citizenship and are subject to human rights violations and religious persecution. In 2017, 655,500 fled to Bangladesh over a period of just 100 days. Around one million Rohingya live outside the country, many as refugees or illegal migrants in Bangladesh, Japan, Saudi Arabia, and Malaysia, where they are vulnerable to deportation and live in impoverished conditions.

At least a half million persons of Indian origin are also effectively stateless in Myanmah.

Stateless is also a problem in Thailand, where close to one million hill tribe people lack Thai citizenship because of unreasonably short filing deadlines or because, partly as a result of living in rural areas, they are unable to provide documentation of their birthplace or

parentage. Children among the two million Burmese refugees or economic migrants in Thailand are ineligible for Thai or Burmese citizenship, rendering them stateless.

Persons of Chinese descent also face restrictions on citizenship rights in Indonesia (though the situation has improved in recent years), Korea, and in Vietnam.

Tens of thousands of undocumented children of migrant parents in Sabah in eastern Malaysia are believed to be stateless and extremely vulnerable, particularly those whose parents have been deported.

Nepal: Lasting close to twenty years, the situation for over 100,000 Bhutanese refugees in Nepal is among the most protracted situations of statelessness, although the U.S. has recently agreed to resettle 60,000. Nepal's aggressive registration efforts have reduced a stateless population of 3.4 million to 800,000.

Positive developments have taken place in Bangladesh, where a 2008 High Court judgment confirmed the citizenship rights of most members of the Urdu-speaking community. Their status had been disputed since Bangladesh's independence from Pakistan in 1971.

In Sri Lanka, under a 2003 nationality law, over 200,000 Hill Tamils have reportedly received citizenship documentation.

Discrimination against women through nationality laws is waning in some countries, but serious obstacles remain.

In setting out these facts, my point is that there is an unprecedented global challenge to respond to the humanitarian crisis posed by the mass movement of peoples across national boundaries, placing a strain on established laws and processes under the Refugee and Geneva Conventions. These facts also place in context what is suggest is the egregious failure by Australia to accord the rights to seek and enjoy asylum established by international law, rights that are owed to those that seek our protection.

It is in this global and regional context that I come to the particular diplomatic and legal tensions over deportations of NZ citizens by Australia.

In considering the law that underlies these tensions, I am especially concerned that in many respects Australians and New Zealanders no longer seem to speak the same language. This is a strong statement. What do I mean by it? When considering Australia's refugee and asylum seeker laws, it is important to understand, as a foundational point, that Australia is the only democracy, and the only common law country, in the world that does not have some form of Charter or Bill of Rights. While this would not necessarily be fatal to the protection of human rights, the Australian human rights deficit is compounded by the fact that our Constitution articulates and protects very few common law freedoms and rights.

By contrast, New Zealand has had a Charter of Human Rights for 28 years. While resorted to infrequently by the NZ courts- I believe a declaration of incompatibility has been made only once- its importance lies in the practice that a Charter influences government decision making at all levels and provides a benchmark for ensuring fundamental freedoms are

respected. In short, New Zealanders speak the language of human rights, rights that inform their perspective on challenging issues in contemporary society. Indeed, I am always impressed on landing in NZ that signs are in the English and Mauri languages.

New Zealand has also had a very special impact on Australian politics by granting citizenship to a number of our politicians who, as dual citizens are not eligible to have office, including the Deputy leader of the Government. Your generosity in granting NZ citizenship is sadly not matched by Australia where citizenship is not easy to acquire, even for a Kiwi.

Let us look at recent events. Just a few days ago, it was reported that New Zealand's PM attempted to deal directly with the Government of Nauru after failing to get any response from Australia's Minister for Home Affairs, the new Super Ministry that deals with Border protection and migration. Her efforts were to no avail it seems.

In July, New Zealand Justice Minister, Andrew Little, criticised Australia's deportation policy. Minister Peter Dutton responded by asking NZ to '*reflect a little on the relationship between'* our two countries.

Minister Little came back, saying: *"every country has the sovereign right to make their own laws. But when those laws threaten human rights, then we should call it out".*

Mr Dutton has since denied access to medical treatment in Australia to several children detained on Nauru, saying, if we show any compassion for the children on Nauru, our border security will be at risk; we will see a return to 2013 and 50,000 asylum seekers and refugees arriving by boat with people smugglers and a 1000deaths at sea. Thus the binary argument that detaining children indefinitely has been maintained.

Case examples:

- Mr Wareta, 46 deported after 25 years in Australia for prison sentences, driving without a license, common assault, and intimidation, working as a sheep sheerer, separated from his partner and 3 children , all Australian citizens.

- 17 year old teenager with NZ citizenship detained for deportation, does not want to return to the NZ. NZ's acting PM Winston Peters accused Australia of breaching the UN CROC by detaining a teenager. "This person is regarded as a child or a minor and I'm just reminding Australians-you're a signatory, live up to it'. Home Affairs Minister Peter Dutton responded saying "I'm not going to allow into the community people that pose a risk to Australian citizens"… particularly where someone has committed multiple offences; I will rely on advice as to cancellation of his visa and then deportation…. He repeated the statement made in respect of similar concerns by the UN Human Rights Council and the Universal periodic Review: "Australia has obligations that we meet." Australia acts in accordance with international law".

- Suicide in maximum security detention pending deportation, held in solitary confinement, some mental illness.

- Former NZ soldier Ko Haapu's visa cancellation as he was a member of a Rebel motor cycle club, not banned in WA.

- Shane Martin, father of Dustin Martin, deported to NZ in 2016 for links with an outlawed gang.

While one might not have much sympathy for some of these people, they are human beings with rights under international law: rights to family, not to be detained arbitrarily without charge or trial, freedom of movement, right to a nationality.

Also souring Aust/NZ inter-governmental relations has been the repeated refusal by Australia to accept NZ's offer to take 150 refugees from Manus and Nauru; though I understand this remains 'on the table'. Ironically, the US has taken about 290 refugees, despite the characterisation by President Trump that it is a 'bad deal'.

Let us look at some facts: 26 April 2018

In Australia, we still have 119 children on Nauru, 785 men on Manus and 1,300 people in immigration detention in mainland prisons, including 264 in Perth's Yongah Hill and 304 on Christmas Island.

- Average length of detention: **434** days, with **264** people having spent more than 730 days in detention
- Children in community detention: **180**, and in the community on a bridging visa E: **3,038**

    - New Zealanders comprise the majority of those held in immigration detention (191), Vietnam (119), Sri Lanka (116), and Iran (109). They are often held in detention for many months awaiting processing of their deportation or appeal (within 28 days of cancellation, mandatory detention pending appeal). Detainees have reported acts of violence, abuse by security guards, and a lack of medical treatment. They are also isolated from their families and legal support. Almost 20 per cent of Kiwis held in detention have been there for more than 2 years.

    - 50% of Australia's deportations are NZ citizens

    - 1,300 Kiwis have been deported in the last 3 years, since January 2015.

On legal principle, removal from a country which has been home to a person should not be done lightly, especially where they have no real connection to the place of citizenship; laws re the right to family, children.

Minister Dutton said with respect to the deportations of members of the Rebels outlaw motorcycle gang…*"we know that they are part of a syndicate which is the biggest distributor of drugs in our country…if you're a member of that gang, you face deportation."*

Peter FitzSimons hit back saying, *"You imply a raft of strong allegations, accusations against the fellow that we can't see."*
"Well, Peter, that happens every day. I mean, there's intelligence that's gathered that's not released for a variety of reasons," Mr Dutton said. Lack of transparency.

Racial bias

- Of those sent back to New Zealand from January 2015 to April 2018, at least 60 per cent were Maori or Pacific Islander. I can attest to this. On one of my detention monitoring visits, I saw Pacific islanders 6 bunks to a small room, in cramped facilities the size of a suburban house.

- Why? Citizenship is increasingly out of reach. While about 600,000 Kiwis live in Australia, only 8.4 per cent of the 146,000 New Zealand-born migrants who arrived in Australia from 2002 to 2011 had acquired Australian citizenship by 2016. The rate for New Zealand-born Maori was even lower, just under 3 per cent. Not stateless as babies born to Kiwis overseas are also citizens of NZ.

- Australians living in New Zealand — 22,470, according to 2013 census figures — fare better. They are granted permanent residency on arrival and can apply for citizenship after five years. They can also become eligible for unemployment support and student loans. Accordingly, many New Zealanders now lack a safety net when they live in Australia. Policy changes in 2001 and subsequent years restricted their eligibility for a number of social security benefits, including unemployment and disability support. Although they still have access to Australia's universal health care system, they have mostly been unable to get student loans, and without a clear path to citizenship, many remain in limbo, living permanently on temporary visas that allow them to work but offer limited protections if they lose their jobs

Let us look at the law

Firstly, under international law, deportation is an exercise of national sovereignty and has not as such contrary been to international law. But, sovereignty is not and has never been an absolute right of the nation state. In the 20th century, in particular, states have agreed upon treaties to ensure that sovereign rights are exercised with respect to human rights:

- the power to deport is limited by the prohibition on acting arbitrarily or abusively
- to freedom of movement
- the rights of persons under the Refugees and Statelessness Conventions.
- How does the law of State Responsibility apply? There is an obligation on states to all those within their jurisdiction whether they are aliens or citizens, to respect and non-discrimination.
- **Who is responsible for long term residents?** Difficult question, because we frame any answer within the construct of increasingly absolute notions of national

sovereignty. We may need to consider wider levels of responsibility based in presence within the jurisdiction, responsibility to aliens under principles of State responsibility.

- The Australian High Court has for example stressed that an alien is not an "out law" and is entitled to fair and humane treatment under the rule of law.

In these respects, one could say that sovereignty is restrained by the treaty obligations including the Universal Declaration on Human Rights and the ICCPR.

UN Human Rights Committee 2011 made findings against Australia's deportation of a man to Sweden who was a few weeks old when he was brought to Australia and was 33 years old on deportation to Sweden.

What is Australian law on deportation? Australia deports on three main grounds:

1. Conviction on a criminal charge for which a criminal sentence has been served; raises problems for those who have no connection with NZ and have family in Australia.
2. The Australian Government amended the *Migration Act* in December 2014, lowering the threshold for the 'character test'(s 501(6) Migration Act). Any non-citizen who has been sentenced to 12 months or more in prison, or who is a known associate of a criminal organisation, will fail the 'character test', even if there is no conviction. Their visa is automatically cancelled, and they will be placed in an Immigration detention centre to await deportation. The legislation is retrospective, and cumulative sentencing totalling 12 months or more will see someone fail the character test.
   In 2017, 600 Kiwis were deported on this ground, and 50% of visa cancellations are of Kiwis.
3. Person is or may present a 'risk to health, safety or good order of the Australian community". S 116(1) (e) *Migration Act*

People who have served their sentence should not be punished again by being deported from the country they call home.

Appeals to the AAT

65% of appeals to the AAT from 2017-18 concern migration and refugee matters. Different appeal rights apply to different grounds, and in some cases the only right of appeal is to the person who made to decision in the first place, the minister of immigration. Visa cancellations made by the Minister are not subject to review by the AAT. Any successful appeal under the AAT can be overturned or amended by the Minister, and he does so under *Migration Act* amendments in 2014, led to significant increase in visa cancellations from 84

in 2013 to 1,284 in 2016-17. (on average only 20% of visa cancellations are set aside by the AAT).

These are ill-defined powers. And they create the greatest risk of arbitrary or abusive decision-making. It all adds up to a considerable threat to basic human rights.

Problems with independence of the AAT over recent years, political appointments and failures to make appointments.

Failure of the rule of law: phrase slips easily, and is used variously to support ideological positions:

- Separation of powers and independence of the judiciary
- Penalties are for the judiciary
- Judicial review of ministerial decisions
- Prohibition of arbitrary detention without charge or trial
- Due process
- Common law freedoms and legislative restraint

Summary: essentially an issue to be resolved by diplomacy, not law.

How has it come to this?

Australia's growing isolation and exceptionalism in respect to human rights protection

Good international citizen historically: Doc Evatt: 1948 Universal Declaration of Human Rights, 70th anniversary, Art 14: right to seek and enjoy asylum.

2001 change in direction: Howard statement, "*we will decide who comes to Australia and the manner of their coming*", set the tone for the following nearly two decades.

Today Australia's protection of human rights is in decline, regressive in numerous ways; refugee policy and offshore detention; indigenous incarceration, growing and unprecedented executive discretion, diminution of the independence of the courts through mandatory sentencing, failure to make timely appointments; domestic violence, homelessness, disempowerment of women, WEF Global Gender Index.

Exceptionalist and isolation from the laws and jurisprudence of comparable nations:

- Constitution protect few rights, no right to freedom of speech, or to vote, no prohibition on arbitrary detention, no rights to privacy, freedom of movement; freedom of religious expression is protected along with right to judicial review and compensation for property expropriated; right to political expression and to vote are implied by the High Court

- Would not matter if we had legislation to protect rights: very limited re sex and race. ICCPR, CROC, Refugee Convention: treaties, not implemented by national law
- Parliament and legislation,
- Common law: Courts lack tools and will always apply clear statutes

I suggest that, if parliamentary process fail to protect human rights, if Parliament does not exercise its historical restraint, if the courts do not have the constitutional powers to apply common law freedoms in the face of unequivocal words of a statute, it is time we revisited the possibility of a legislated charter of human rights.

What difference would a Charter make to human rights?

M68 case and PNG Supreme Ct

The isolation of Australian law from the protections given to asylum seekers by most comparable nations is demonstrated by the unanimous decision of the PNG Supreme Court in Namah v Pato, on 26 April 2016. The Supreme Court found that the detention of asylum seekers on Manus Island was invalid under the Constitution that provides, 'No person shall be deprived of his personal liberty', subject to express exceptions.

The words of the Supreme Court are worth repeating:

> Any deprivation of a person's liberty outside what is provided for will undoubtedly be unconstitutional and illegal.
>
> In the present case, the undisputed facts clearly reveal that the asylum seekers had no intention of entering and remaining in PNG. …It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will. This [sic] arrangements were outside the Constitutional and legal framework in PNG. (paras 38-39.)

The PNG Supreme Court also held that a 2014 amendment to the PNG Constitution, which purported to allow the detention of foreign nationals pursuant to an agreement with another country, was unconstitutional and illegal. It ordered that the Australian and Papua New Guinean governments end the detention of asylum seekers. Accordingly, Prime Minister O'Neal's Government closed the detention centres in October 2017 and transferred the detainees to other Australian constructed accommodation on Manus Island, in effect replicating detention.

M68 Case

Nearly three months earlier on 3 February 2016 in the M68 case, the High Court of Australia had confirmed the constitutional validity of our offshore processing regime. We have seen surprisingly little successful litigation challenging the exercise of executive discretion. A Bangladeshi woman, an asylum seeker, had been intercepted at sea four years earlier and detained on Christmas Island as an 'unlawful non-citizen' under the Migration Act. She was transferred to Nauru on 22 Jan 2014 and gave birth to a daughter in Brisbane on 16 December 2014. She asked the High Court to prevent her enforced return to Nauru on the

ground that her detention offshore by the Commonwealth was unlawful. She had claimed refugee status, but it had not yet been determined by the time of the Court's decision nearly 2 and a half years after her arrival.

The Plaintiff challenged the constitutional validity of section198 AHA (2) of the Migration Act, under which an officer is bound to take an 'unauthorized maritime arrival' to a regional processing country. The Government realised that the Migration Act probably did not authorise an official to force her to Nauru and the Government introduced an amendment repairing the defect…section198AHA (2) on 30 June 2015, with retrospective effect to 18 August 2012, providing the necessary legislative authority. On this basis, the majority of judges rejected her challenge and authorised her return.

The 6member majority of the High Court found that section 198AHA is a valid law of the Commonwealth.

Justice Gordon was the sole dissentient. She considered that section198AHA is invalid because it attempts to vest a judicial penal power in the executive, contrary to the doctrine of the separation of powers. Respectfully, I agree. Immigration detention has become a penal sanction that may be imposed only by a judge under the rule of law. This is, for the moment, a minority view.

Justice Gageler noted that the Australian government procured the services of Transfield, and through it those of Wilson Security, to detain the Plaintiff at the regional processing centre on Nauru. This, he considered appeared to be beyond the executive power of the Commonwealth as, at that time, there was no law of federal parliament to permit it.

I am troubled by this analysis for several reasons.

First, I wonder how far parliament can go before the courts will step in to insist on the principles of legality and common law. An unambiguous law passed by Parliament should not be permitted to override our fundamental rights. Even Parliament is subject to the rule of law.

Secondly, the offshore processing regime as it has evolved, is egregiously in breach of Australia's international obligations under the Refugee Convention, the Convention on the Rights of the Child, the Torture Convention and the ICCPRs. No judge refers to these treaty protections. It is not acceptable for our courts to ignore the legal regime of obligations under international law and I wonder why so few judges consider the common law presumption that Parliament intends to comply with international law.

Green shoots of hope

International/ global situation

Two UN Global Compacts: voluntary

- Refugees: UNHCR 2018 Gen Assembly

- Migration: intergovernmental talks with rapporteurs Mexico and Switz., with UN SG and IOM, to report to Special Summit in Morocco December 2018

Aims:

- re Burden and responsibility sharing
- strengthen national protection systems and response capabilities
- enhance socio economic situations for refugees and host countries
- assistance for local communities
- deal with protracted problems: Manus and Nauru
- Lead to a program of action and Response Framework

Need to cover those not covered by the definition of a refugee under the 1951 Convention.

Will these compacts make a difference?

All depends on political will.

Duty of Care: Federal court decisions

Federal court cases based on duty of care: most resolved at the door of the court to avoid jurisprudence; relatively minor damages and costs $90m for 37 men on Manus