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**PART TWO: THE PREVENTION AND  
REDUCTION OF STATELESSNESS IN  
AUSTRALIA — AN ONGOING CHALLENGE**

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## PART TWO: THE PREVENTION AND REDUCTION OF STATELESSNESS IN AUSTRALIA — AN ONGOING CHALLENGE

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*Despite renewed global interest in statelessness over the past decade, stimulated in part by the 50<sup>th</sup> anniversary of the 1961 Convention on the Reduction of Statelessness in 2011 and the 60<sup>th</sup> anniversary of the 1954 Convention Relating to the Status of Stateless Persons in 2014, there has been virtually no legal or academic analysis of statelessness in Australia. This article, together with its companion piece, provides the first comprehensive analysis of the state of statelessness in Australian law. While the focus of the first article was on Australia's compliance with obligations to identify and accord a secure legal status to stateless persons who seek protection in Australia, the focus of the present article is on Australia's obligations with respect to the prevention and reduction of statelessness. Even though Australia does not have a large stateless population, however measured, there are nonetheless cohorts of people who do not have a nationality, may be at risk of losing their nationality, or may face difficulties acquiring Australian citizenship. This article undertakes the first comprehensive assessment of the extent to which Australian law complies with international legal obligations to prevent and reduce statelessness. In particular, it provides the first in-depth analysis of the ramifications of the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth) for*

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*such obligations. It concludes that despite Australia’s relatively early ratification of the 1961 Convention, there remain ongoing issues with respect to its full implementation.*

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I INTRODUCTION

Statelessness is not merely a legal problem, it is a human problem.<sup>1</sup>

It has long been recognised that collective international action is essential ‘to ensure that everyone shall have an effective right to a nationality.’<sup>2</sup> Yet, although the international community originally considered the problems of statelessness and refugee movements to be intertwined, the decision in the early 1950s to establish two separate legal regimes resulted in a relegation of

<sup>1</sup> Carol A Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10 *International Journal of Refugee Law* 156, 159. A similar observation was made by Paul Weis: Paul Weis, ‘The United Nations Convention on the Reduction of Statelessness, 1961’ (1962) 11 *International and Comparative Law Quarterly* 1073, 1090.

<sup>2</sup> ESC Res 116 (VI) (D), UN ESCOR, 6<sup>th</sup> sess, UN Doc E/777 (12 March 1948, adopted 1–2 March 1948) 18.

statelessness to relative obscurity.<sup>3</sup> Over the past decade, however, there has been renewed interest in and commitment to resolving the endemic problem of statelessness, most clearly exemplified by the United Nations High Commissioner for Refugees' ('UNHCR') *Global Action Plan to End Statelessness 2014–24*, which sets out to end statelessness by 2024.<sup>4</sup> Central to the plan is the prevention and reduction of statelessness, which relies in part on encouraging more states to ratify and implement the *Convention on the Reduction of Statelessness* ('1961 Convention').<sup>5</sup>

This article provides the first comprehensive analysis of the extent to which Australia complies with its obligations under the *1961 Convention* and other relevant international instruments to prevent and reduce statelessness. Although Australia does not have a large stateless population,<sup>6</sup> there are nevertheless particular cohorts of people who do not have a nationality, may be at risk of losing their nationality, or may face difficulties acquiring Australian citizenship. In Part II, we briefly set out the background and context to statelessness, before examining the relevant international legal framework and Australia's obligations in Part III. In Part IV, we outline the way in which statelessness and citizenship is regulated in Australian law, explaining that a lack of constitutional safeguards means that it is entirely regulated by statute, thus placing a large amount of discretion in the Parliament with limited scope for the judiciary to intervene. In Part V, we turn to the core of the analysis, namely the extent to which Australian law protects against statelessness in relation to the acquisition and deprivation of citizenship, focusing in particular on amendments made in 2015 to the *Australian Citizenship Act 2007* (Cth) ('*Citizenship Act*').

<sup>3</sup> Alice Edwards and Laura van Waas, 'Statelessness' in Elena Fiddian-Qasmiyeh et al (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 290, 290.

<sup>4</sup> United Nations High Commissioner for Refugees, *Global Action Plan to End Statelessness 2014–24* (2014).

<sup>5</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975). See also *ibid* 23.

<sup>6</sup> Michelle Foster, Jane McAdam and Davina Wadley, 'Part One: The Protection of Stateless Persons in Australian Law — The Rationale for a Statelessness Determination Procedure' (2016) 40 *Melbourne University Law Review* (forthcoming), which discusses the limited data available on the size and profile of Australia's stateless population.

## II BACKGROUND AND CONTEXT: WHAT IS STATELESSNESS AND WHY DOES IT MATTER?

In a companion article published in the same issue, we outlined what statelessness is and why it matters.<sup>7</sup> To summarise briefly, art 1(1) of the 1954 *Convention Relating to the Status of Stateless Persons* ('1954 Convention') provides that a stateless person is someone 'who is not considered as a national by any State under the operation of its law.'<sup>8</sup> Typically, stateless persons live in a 'legal limbo'<sup>9</sup> characterised by vulnerability, insecurity and marginalisation.<sup>10</sup> They commonly face difficulties accessing basic human rights, such as education, employment, housing and healthcare,<sup>11</sup> and are at a heightened risk of exploitation, arrest and arbitrary detention because they cannot prove who they are or that they have links to any country.<sup>12</sup> There are millions of stateless persons in the world, but the majority reside in the Asia-Pacific region.<sup>13</sup>

Statelessness may arise from a wide range of circumstances, including discriminatory or conflicting nationality laws,<sup>14</sup> arbitrary deprivation of

<sup>7</sup> Ibid. This Part draws closely on that article.

<sup>8</sup> *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art(1).

<sup>9</sup> Harry J Kits, 'Betwixt and between: Refugees and Stateless Persons in Limbo' (2005) 22(2) *Refuge* 3, 5.

<sup>10</sup> UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014) 1. Although it is acknowledged that the situation can vary widely: in South East Asia the situation is quite different as between Thailand, Brunei and Singapore on the one hand and Myanmar on the other. We are grateful to Nick Oakeshott for this insight.

<sup>11</sup> See, eg, Marilyn Achiron and Radha Govil, *Nationality and Statelessness: Handbook for Parliamentarians No 22* (Inter-Parliamentary Union/UNHCR, 2<sup>nd</sup> ed, 2014) 3, 3; Kristy A Belton, 'Statelessness: A Matter of Human Rights' in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press, 2015) 31, 36–40; Sophie Nonnenmacher and Ryszard Cholewinski, 'The Nexus between Statelessness and Migration' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 247, 249–50.

<sup>12</sup> Nonnenmacher and Cholewinski, above n 11, 254–5, 261; Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', above n 1, 159.

<sup>13</sup> 'Annex' (2014) 14 *UNHCR Statistical Yearbook* 79, 83.

<sup>14</sup> See, eg, UNHCR, 'Gender Equality, Nationality Laws and Statelessness 2014' (Background Note, UNHCR, 7 March 2014) <<http://www.unhcr.org/4f5886306.html>>. On denationalisation in the United Kingdom see Matthew J Gibney, 'The Deprivation of Citizenship in the United Kingdom: A Brief History' (2014) 28 *Journal of Immigration, Asylum and Nationality Law* 326.

nationality, state succession and territorial changes, barriers to birth and other civil registration procedures, administrative oversight, renunciation of one nationality without acquiring another, being born to a stateless person, marriage or divorce, and denationalisation.<sup>15</sup> In the view of one leading scholar, the 'primary injustice' experienced by stateless persons 'is not that they cannot find a state to grant them citizenship but that the state which should grant them citizenship will, for various reasons, not do so.'<sup>16</sup> As Blitz and Lynch have noted, although many stateless persons effectively 'struggle to exist',<sup>17</sup> the conferral of citizenship on once-stateless populations offers 'very real and important material and non-material benefits at both the community and individual levels.'<sup>18</sup>

Yet in many countries, including Australia, there is no formal mechanism in place to identify stateless persons. While some may be discovered through the refugee status determination process, others may go undetected. Even when a stateless person is identified, there is no domestic legal status that attaches unless he or she is also recognised as a refugee or beneficiary of complementary protection. As such, he or she may be at risk of indefinite detention, or only be eligible for a temporary visa with a limited set of entitlements.<sup>19</sup>

<sup>15</sup> See generally Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia, 2008); Hélène Lambert, *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*, UN Doc PPLA/2014/01 (October 2014) 14 <<http://www.unhcr.org/5433f0f09.html>>; P Weis, *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff, 2<sup>nd</sup> ed, 1979); UNHCR, 'Gender Equality Background Note', above n 14.

<sup>16</sup> Matthew J Gibney, 'Statelessness and the Right to Citizenship' (2009) 32 *Forced Migration Review* 50, 50.

<sup>17</sup> Maureen Lynch and Brad K Blitz, 'Summary and Conclusions' in Brad K Blitz and Maureen Lynch (eds), *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar, 2011) 194, 195.

<sup>18</sup> *Ibid* 203. See also Lindsey N Kingston and Kathryn R Stam, 'Recovering from Statelessness: Resettled Bhutanese-Nepali and Karen Refugees Reflect on the Lack of Legal Nationality' (2016) *Journal of Human Rights* (forthcoming).

<sup>19</sup> See the discussion in Foster, McAdam and Wadley, above n 6.

### III THE INTERNATIONAL LEGAL FRAMEWORK AND AUSTRALIA'S OBLIGATIONS

While '[e]veryone has the right to a nationality' under international human rights law,<sup>20</sup> states do not have a corresponding duty to *confer* nationality, other than on certain children.<sup>21</sup> It is therefore 'for each State to determine under its own law who are its nationals.'<sup>22</sup> As Weis notes, from the perspective of international law, 'the stateless person is an anomaly, nationality still being the principal link between the individual and the Law of Nations.'<sup>23</sup>

The two international treaties on statelessness are the *1954 Convention* and the *1961 Convention*. As detailed above, the *1954 Convention* defines a 'stateless person' in art 1(1) as 'a person who is not considered as a national by any State under the operation of its law',<sup>24</sup> while the remainder of the treaty sets out the legal status of stateless persons.<sup>25</sup> It is designed to ensure that

<sup>20</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 15(1) ('*Universal Declaration of Human Rights*').

<sup>21</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3) ('*JCCPR*') provides only that: 'Every child has the right to acquire a nationality.' This does not necessarily require states to grant nationality to every child born in their territory, since they may have the right to another nationality, but it does require them to confer nationality on children who would otherwise be stateless: Human Rights Committee, 'General Comment No 17: Article 24 (Rights of the Child)', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (27 May 2008) vol 1, 193, 195 [8]; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 726. See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7 ('*Convention on the Rights of the Child*').

<sup>22</sup> *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937) art 1.

<sup>23</sup> Weis, '*Convention on the Reduction of Statelessness*', above n 1, 1073. As Batchelor notes, nationality 'serves as a basis for certain rights, including the State's right to grant diplomatic protection and representation of the individual on the international level': Batchelor, '*Statelessness and the Problem of Resolving Nationality Status*', above n 1, 159–60.

<sup>24</sup> Nationality 'refer[s] to a legal bond between an individual and a State': Carol Batchelor, '*The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization*' (2005) 22(2) *Refugee* 31, 36. For the purposes of this article, the terms 'nationality' and 'citizenship' are used interchangeably.

<sup>25</sup> While the *1954 Convention* does not technically require that a person be outside their country, the rights regime is modelled on that contained in the 1951 *Refugee Convention* and thus appears to assume that this is the case in conditioning rights to be delivered at the same level as aliens or most favoured nationals in some cases and of citizens in others.

‘those who find themselves stateless need not be consigned to a life without dignity and security.’<sup>26</sup>

Most stateless persons reside within the country of their birth or long-term residence.<sup>27</sup> As such, the answer to their predicament is more appropriately found not in formal recognition as ‘stateless persons’, but rather through the opportunity to acquire or confirm the nationality to which they have links (for example, through the reform of nationality laws).<sup>28</sup>

When the Ad Hoc Committee on Statelessness and Related Problems met in New York in 1950 to consider the desirability of a new treaty on the international status of refugees and stateless persons and ways to eliminate future statelessness,<sup>29</sup> the latter was separated out from the more urgent question of what legal status stateless persons should have.<sup>30</sup> Eliminating statelessness was regarded as an issue that required international cooperation and the adoption of treaties, and since the Ad Hoc Committee had limited time and resources, it decided to transfer this task to the International Law Commission (‘ILC’) which was already seized with the question of nationality, including statelessness.<sup>31</sup> In due course, the United Nations (‘UN’) General Assembly expressed its desire for an international conference to be convened so that a treaty might be concluded.<sup>32</sup>

Accordingly, the UN Conference on the Elimination or Reduction of Future Statelessness met in 1959 and 1961 to formulate a treaty on this subject. As Batchelor notes, its objective was to fill ‘gaps created by conflicts of law.’<sup>33</sup>

<sup>26</sup> UNHCR, *Handbook on Protection of Stateless Persons*, above n 10, 1.

<sup>27</sup> Achiron and Govil, above n 11, 3, 11; Institute on Statelessness and Inclusion, *The World’s Stateless* (2014) 21.

<sup>28</sup> ‘Statelessness was seen as “undesirable” from the perspective of orderly international relations, for every individual should be “attributed to some State”; and it was also undesirable for the individual, because of its “precariousness”’: Guy S Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness* (2017) United Nations Audiovisual Library of International Law <<http://legal.un.org/avl/ha/crs/crs.html>>.

<sup>29</sup> ESC Res 248 (IX) (B), UN ESCOR, 9<sup>th</sup> sess, Supp No 1, UN Doc E/1553/Corr.1 (8 December 1949, adopted 8 August 1949) 60–1.

<sup>30</sup> Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness*, above n 28. For a detailed history see Weis, ‘*Convention on the Reduction of Statelessness*’, above n 1, 1073–80.

<sup>31</sup> Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness*, above n 28; Carol A Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7 *International Journal of Refugee Law* 232, 243–4, 249.

<sup>32</sup> Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness*, above n 28; Batchelor, ‘Stateless Persons’, above n 31, 250.

<sup>33</sup> Batchelor, ‘Stateless Persons’, above n 31, 257.



Although the original intention was to draft an instrument to eliminate statelessness, this was considered too ambitious and the focus was instead confined to the reduction of statelessness.<sup>34</sup> Australia did not participate in the drafting process, but it ratified the treaty without any reservations in 1973 (on the same day it ratified the *1954 Convention*).<sup>35</sup>

The United Kingdom ('UK') representative at the Conference stated that '[t]he main cause of statelessness at birth was [said to be] the conflict between *jus soli* [nationality based on where one is born] and *jus sanguinis* [nationality based on one's descent — eg, parents' citizenship].'<sup>36</sup> This tension lay at the heart of the different approaches taken by states during the process of drafting the *1961 Convention*. For instance, the Swiss representative argued that while it might be logical for immigration countries to grant nationality to every child born on their soil, many 'over-populated' European states 'could not, without seriously affecting their political and social structures, assimilate thousands of persons who had no real links with them and whose birth on their soil was often fortuitous.'<sup>37</sup> Furthermore, states 'had to ensure that the persons concerned were adapted to the habits, customs and mentality of [their] nationals and that they would become good citizens.'<sup>38</sup> A key challenge, therefore, 'was to find a way for the *jus sanguinis* States to co-operate in reducing future statelessness.'<sup>39</sup>

In addition, as had been previously expressed in the ILC, some states emphasized the internal jurisdiction aspects of nationality and their desire to preserve their right to deprive someone of nationality in certain circumstances. Others argued that deprivation should not be used as a penalty, but thought it was nonetheless appropriate that nationality only be granted where

<sup>34</sup> Ibid 257. The Conference had before it two draft texts prepared by the ILC: one on the elimination of statelessness; and another on the reduction of statelessness: Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness*, above n 28, citing 'Summary Records of the Sixth Session (3 June – 28 July 1954)' [1954] I *Yearbook of the International Law Commission* 1, 3–52; 'Report of the International Law Commission to the General Assembly' [1954] II *Yearbook of the International Law Commission* 140, 141.

<sup>35</sup> See UN Treaty Collection, 3. *Convention Relating to the Status of Stateless Persons*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf>>. This was two years before the *1961 Convention* attracted the requisite number of ratifications to enter into force (on 13 December 1975).

<sup>36</sup> UN Conference on the Elimination or Reduction of Future Statelessness, *Summary Record of the Second Plenary Meeting*, UN GOAR, 2<sup>nd</sup> plen mtg, Agenda Item 7, UN Doc A/CONF.9/SR.2 (24 April 1961) 3 ('*Summary Record of the Second Plenary Meeting*').

<sup>37</sup> Ibid 6.

<sup>38</sup> Ibid 7.

<sup>39</sup> Ibid 7.

there was a genuine link between an individual and the state (and not just the accident of where someone happened to be born).<sup>40</sup>

The UK representative recommended that '[t]he Conference should attempt to steer a middle course by drafting a convention which would secure many ratifications and at the same time represent an appreciable improvement in the lot of stateless persons.'<sup>41</sup> The compromise finally reached enabled states to choose whether to grant nationality at birth by the operation of law, or upon an application being lodged as prescribed by national law. It also permitted states to retain the right to deprive someone of nationality in very limited, defined circumstances, provided that such an intention was notified at the time of signature, ratification or accession.

The purpose of the *1961 Convention*, as set out in its Preamble, is thus 'to reduce statelessness by international agreement'. Although, as an international instrument, it cannot bestow nationality on an individual directly,<sup>42</sup> it imposes positive responsibilities on states to confer nationality in certain circumstances, including in relation to persons 'born in [their] territory who would otherwise be stateless.'<sup>43</sup> It also prohibits the withdrawal or deprivation of nationality in various situations where this would render a person stateless.<sup>44</sup> As Guy S Goodwin-Gill has observed:

One of the most significant elements in the *1961 Convention* is the fact that it imposes *positive* obligations on States to grant nationality in certain circumstances, by contrast with the essentially negative obligations contained in the [earlier] *Convention on Certain Questions relating to the Conflict of Nationality Laws*, adopted in the Hague in 1930.<sup>45</sup>

<sup>40</sup> Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness*, above n 28, citing 'Summary Records of the Fourth Session (4 June – 8 August 1952)' [1952] I *Yearbook of the International Law Commission* 1, 100–42, 190–1, 244, 251–2. See also Weis, 'Convention on the Reduction of Statelessness', above n 1, 1077.

<sup>41</sup> Summary Record of the Second Plenary Meeting, UN Doc A/CONF.9/SR.2, 2.

<sup>42</sup> Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', above n 1, 158.

<sup>43</sup> *1961 Convention* art 1(1).

<sup>44</sup> *Ibid* art 8. The *1961 Convention* also restricts states' capacity to deprive individuals of their nationality where there is a change in personal status such as marriage (art 5), where a person's loss of nationality would otherwise lead to the loss of nationality by that person's spouse or child (art 6), and where the state would otherwise permit renunciation of nationality (art 7). In each case, the *1961 Convention* requires that the relevant person possess or is able to acquire another nationality: see van Waas, *Nationality Matters*, above n 15, 44.

<sup>45</sup> Goodwin-Gill, *Introductory Note: Convention on the Reduction of Statelessness*, above n 28 (emphasis in original). On the 1930 instrument see Weis, 'Convention on the Reduction of Statelessness', above n 1, 1073–4.

The duty is not absolute, and certain conditions may be attached (such as age, habitual residence, conduct and so on).<sup>46</sup>

Another noteworthy feature of the *1961 Convention* is its prohibition on states 'depriv[ing] any person or group of persons of their nationality on racial, ethnic, religious or political grounds.'<sup>47</sup> Universal adherence to this provision would drastically reduce the numbers of stateless persons in the world, given the prevalence of discrimination as an underlying cause of statelessness. Indeed, as Batchelor has observed, 'if all States actively applied the provisions of the *1961 Convention*, there would be a decrease in the number of cases arising in relation to the *1954 Convention*.'<sup>48</sup>

In addition to the two specialist statelessness treaties, any assessment of the rights and entitlements of stateless persons must also take into account the widely ratified international human rights treaties that impose obligations relevant to the prevention and reduction of statelessness, and the protection of stateless persons.<sup>49</sup> For example, some prohibit discrimination in the enjoyment of rights on the grounds of 'national or social origin' or 'other status' (which clearly includes stateless persons).<sup>50</sup> The *International Convention on the Elimination of All Forms of Racial Discrimination* specifically provides that laws relating to nationality, citizenship or naturalisation must 'not discriminate against any particular nationality'.<sup>51</sup>

Some treaties contain particular protections for children in this context. Article 24 of the *ICCPR* provides that '[e]very child shall be registered

<sup>46</sup> *1961 Convention* art 1.

<sup>47</sup> *Ibid* art 9.

<sup>48</sup> Batchelor, 'The *1954 Convention*', above n 24, 35.

<sup>49</sup> *ICCPR* art 24(3); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(iii); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 9 ('Convention on the Elimination of All Forms of Discrimination against Women'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 18 ('Convention on the Rights of Persons with Disabilities'); *Convention on the Rights of the Child* art 7; *Universal Declaration of Human Rights*, UN Doc A/810, art 15. See also Executive Committee of the High Commissioner's Programme, Report of the Fifty-Seventh Session of the Executive Committee of the High Commissioner's Programme, UN GAOR, 57<sup>th</sup> sess, Agenda Item 14, UN Doc A/AC.96/1035 (10 October 2006) 13–17 [18].

<sup>50</sup> See, eg, *ICCPR* arts 24(1), 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

<sup>51</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 1(3).

immediately after birth and shall have a name,<sup>52</sup> and that '[e]very child has the right to acquire a nationality.'<sup>53</sup> Similarly, art 7(1) of the *Convention on the Rights of the Child* stipulates that '[the] child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.'<sup>54</sup> This is replicated in art 18(2) of the *Convention on the Rights of Persons with Disabilities* with respect to children with disabilities. The *Convention on the Rights of the Child* also provides that:

States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.<sup>55</sup>

It is noteworthy that during the drafting of the 1961 *Convention*, the Argentine representative referred to art 15 of the *Universal Declaration of Human Rights* (the right to a nationality)<sup>56</sup> 'to emphasize the psychological importance of a child acquiring a nationality at birth and of knowing that he would have the right to keep it when he reached his majority, provided he complied with certain conditions.'<sup>57</sup> Subsequent academic work has confirmed both the fundamental importance of and ongoing challenges in ensuring access to citizenship for children globally.<sup>58</sup>

Article 9 of the *Convention on the Elimination of All Forms of Discrimination against Women* provides that 'States Parties shall grant women equal rights with men to acquire, change or retain their nationality,'<sup>59</sup> and 'shall

<sup>52</sup> ICCPR art 24(2).

<sup>53</sup> Ibid art 24(3). As noted in above n 21, this does not necessarily require states to grant nationality to every child born in their territory unless they would otherwise be stateless.

<sup>54</sup> Australia has ratified with no relevant reservations: UN Committee on the Rights of the Child, *Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child*, UN Doc CRC/C/2/Rev.3 (11 July 1994) 12.

<sup>55</sup> *Convention on the Rights of the Child* art 7(2).

<sup>56</sup> *Universal Declaration of Human Rights*, UN Doc A/810, art 15.

<sup>57</sup> UN Conference on the Elimination or Reduction of Future Statelessness, *Summary Record of the Fourth Plenary Meeting*, UN GAOR, 4<sup>th</sup> plen mtg, Agenda Item 7, UN Doc A/CONF.9/SR.4 (24 April 1961) 3.

<sup>58</sup> Jacqueline Bhabha's work is particularly authoritative: see, eg, Jacqueline Bhabha, 'From Citizen to Migrant: The Scope of Child Statelessness in the Twenty-First Century' in Jacqueline Bhabha (ed), *Children without a State: A Global Human Rights Challenge* (MIT Press, 2011) 1; Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (Princeton University Press, 2014).

<sup>59</sup> *Convention on the Elimination of All Forms of Discrimination against Women* art 9(1).

grant women equal rights with men with respect to the nationality of their children.<sup>60</sup> The *Convention on the Rights of Persons with Disabilities* similarly provides that states shall ensure that persons with disabilities '[h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability'.<sup>61</sup>

In 2011, the UNHCR convened a Ministerial Intergovernmental Event to mark the 60<sup>th</sup> anniversary of the 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*')<sup>62</sup> and the 50<sup>th</sup> anniversary of the 1961 *Convention* respectively, and to invite states to make concrete commitments to improve protection and assistance for refugees and stateless persons. At that meeting, 33 states pledged to accede to one or both of the statelessness treaties, and over 40 states committed to implementing other measures to reduce statelessness, such as through the reform of domestic nationality laws.<sup>63</sup>

It was in this context that Australia pledged:

to better identify stateless persons and assess their claims. Australia is committed to minimising the incidence of statelessness and to ensuring that stateless persons are treated no less favourably than people with an identified nationality. Australia will continue to work with UNHCR, civil society and interested parties to progress this pledge.<sup>64</sup>

While not legally binding, this pledge signalled a high-level commitment to improving the lives of stateless persons in Australia. It provides the background against which we analyse current Australian law to determine how fully it reflects Australia's obligations to protect stateless persons and to reduce statelessness through its citizenship laws.

<sup>60</sup> Ibid art 9(2). Australia ratified the *Convention* on 28 July 1983 with no relevant reservations: Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women*, 16<sup>th</sup> mtg, Provisional Agenda Item 6, UN Doc CEDAW/SP/2010/2 (1 March 2010) 6.

<sup>61</sup> *Convention on the Rights of Persons with Disabilities* art 18(1)(a).

<sup>62</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>63</sup> UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons* (Geneva, Palais des Nations, 7–8 December 2011) (2012) 12, 32–3. Notwithstanding this, at the time of writing, there were still only 68 states parties to the 1961 *Convention*.

<sup>64</sup> UNHCR, *Pledges 2011*, above n 63, 49.

## IV STATELESSNESS AND CITIZENSHIP LAW IN AUSTRALIA

The *Australian Constitution* does not confer plenary power with respect to ‘nationality’ or ‘citizenship’ on the Commonwealth Parliament, but rather confers plenary power with respect to the related topics of ‘immigration’<sup>65</sup> and ‘aliens.’<sup>66</sup> As the High Court of Australia has observed, the *Constitution* therefore ‘does not identify any specific criterion for membership of the Australian body politic or for the withdrawal of that membership.’<sup>67</sup> Hence, constitutional adjudication concerning the limits and constraints on parliamentary sovereignty in relation to citizenship law has centred on the extent to which there may be a concept of *constitutional non-alien* — that is, the notion that a person may be outside the Commonwealth’s aliens power because of a qualitative connection with Australia regardless of statutory entitlement to citizenship.<sup>68</sup>

In *Singh v Commonwealth*,<sup>69</sup> the High Court rejected the plaintiff’s argument that birth in Australia necessarily accorded her the status of non-alien, and thus a constitutional nationality that could not be displaced by legislation.<sup>70</sup> Indeed, although the High Court continues to insist that the phrase ‘alien’ ‘involves a constitutional concept’ to be interpreted by the Court,<sup>71</sup> and hence that ‘Parliament cannot, simply by giving its own definition of “alien”, expand the power ... to include persons who could not possibly answer the

<sup>65</sup> *Australian Constitution* s 51(xxvii) refers to ‘immigration and emigration’.

<sup>66</sup> *Australian Constitution* s 51(xix) refers to ‘naturalization and aliens’. See generally Sangeetha Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited’ (2013) 39 *Monash University Law Review* 568.

<sup>67</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 409 [41] (Gaudron J).

<sup>68</sup> For a thorough discussion of the history of constitutional adjudication, including in relation to the notion of ‘non-immigrant’, see Michelle Foster, ‘An “Alien” by the Barest of Threads’ — The Legality of the Deportation of Long-Term Residents from Australia’ (2009) 33 *Melbourne University Law Review* 483, 489–503.

<sup>69</sup> (2004) 222 CLR 322.

<sup>70</sup> *Ibid* 340–2 [29]–[33] (Gleeson CJ), 399–400 [203]–[205] (Gummow, Hayne and Heydon JJ), 419 [272] (Kirby J). See also Michelle Foster, ‘Membership in the Australian Community: *Singh v The Commonwealth* and its Consequences for Australian Citizenship Law’ (2006) 34 *Federal Law Review* 161.

<sup>71</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 205 [159] (Kirby J).

description of “aliens”;<sup>72</sup> Foster observes that the Court has ‘consistently resisted arguments that Parliament’s power is so limited’ in notable cases.<sup>73</sup>

It is possible that the Court would be more willing to intervene in a case of deprivation, as opposed to failure to confer nationality, and support for this proposition can be found in obiter comments. For example, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*,<sup>74</sup> Kirby J stated that:

The deprivation of nationality, including nationality by birth and especially in cases affecting minority ethnic communities, has been such a common affront to fundamental rights that I would not, without strong persuasion, hold it to be possible under the *Constitution* of the Australian Commonwealth.<sup>75</sup>

Notwithstanding the possibility of future curial intervention,<sup>76</sup> at present the Commonwealth Parliament enjoys considerable discretion in designing citizenship law and policy, including that pertaining to or affecting stateless-

<sup>72</sup> *Ibid*, quoting *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ).

<sup>73</sup> Foster, ‘An “Alien” by the Barest of Threads’, above n 68, 503. We note the fascinating discussion by Gummow J in *Al-Kateb v Godwin* (2004) 219 CLR 562 about the relationship between constitutional interpretation and the late emergence of an understanding of statelessness. As his Honour acknowledged, ‘[a]t the time of the adoption of the *Constitution*, the phenomenon of “double nationality” was well understood, but that of the “stateless person” achieved significance only in the course of the twentieth century’: at 596 [80] (citations omitted). His Honour observed at 597 [83] (citations omitted): ‘The appellant’s status as a stateless person takes him outside the meaning given to the term “alien” in the joint judgment of six members of the Court in *Nolan v Minister for Immigration and Ethnic Affairs*’. In that case, their Honours said at (1988) 165 CLR 178, 183, quoting *Milne v Huber*, 17 Fed Cas 403, 406 (Ohio Cir, 1843):

As a matter of etymology, ‘alien’, from the Latin *alienus* through old French, means belonging to another person or place. Used as a descriptive word to describe a person’s lack of relationship with a country, the word means, as a matter of ordinary language, ‘nothing more than a citizen or subject of a foreign state’.

In *Al-Kateb v Godwin* (2004) 219 CLR 562, Gummow J went on to consider at 597–8 [85] (citations omitted):

Does that condition deny him the character of a constitutional ‘alien’? It is unnecessary to decide that question now, particularly in the absence of full argument. That is because, at all events, and as the respondents submitted, the appellant is within the reach of the immigration power in s 51(xxvii) and laws supported by that power.

<sup>74</sup> (2005) 222 CLR 439.

<sup>75</sup> *Ibid* 476–7 [96] (citations omitted).

<sup>76</sup> For a very interesting exploration of the question whether the notion of ‘the people’ in the Preamble to the *Constitution* may operate as a constraint on legislative power in this area, see Elisa Arcioni, ‘The Core of the Australian Constitutional People — “The People” as “the Electors”’ (2016) 39 *University of New South Wales Law Journal* 421, 443–6.

ness. This broad discretion is compounded by the fact that international law, including the *1961 Convention*, does not have binding force in Australian law in the absence of domestic implementation, and there is no bill of rights at the Commonwealth level. For these reasons, much of the analysis below focuses on the relevant statutory instrument for regulating citizenship, and hence the prevention and reduction of statelessness: the *Citizenship Act*.

## V THE PREVENTION AND REDUCTION OF STATELESSNESS IN AUSTRALIAN LAW: AN ANALYSIS

There are some aspects of Australian citizenship law and policy that provide good practice with regard to the prevention of statelessness.<sup>77</sup> For instance, Australian citizenship law and policy does not discriminate against persons based on their gender, religion, marital status, ethnicity or other discriminatory grounds adopted by some countries (eg, whether a person is born out of wedlock).<sup>78</sup> Australian citizens are not at risk of having their citizenship revoked on account of extended time abroad.<sup>79</sup> They are permitted to hold multiple citizenships.<sup>80</sup> Further, in accordance with art 2 of the *1961 Convention*, an abandoned child is automatically an Australian citizen ‘unless and until the contrary is proved.’<sup>81</sup> A number of provisions of the *Citizenship Act*

<sup>77</sup> Good practice, with reference to statelessness, is defined as ‘effective implementation of legal standards established by the *1954 Convention*, UNHCR guidance and international human rights law; ‘In addition, and without compromising the first principle, [good practice] facilitates practical efficiency’: Gábor Gyulai, ‘Statelessness Determination and the Protection Status of Stateless Persons: A Summary Guide of Good Practices and Factors to Consider when Designing National Determination and Protection Mechanisms’ (Guidelines, European Network on Statelessness, 2013) 7 (emphasis altered).

<sup>78</sup> In Madagascar, for example, ‘mothers are only permitted to confer nationality on children born in wedlock if the father is stateless or of unknown nationality’: UNHCR, ‘Gender Equality Background Note’, above n 14.

<sup>79</sup> This is in contrast to Indonesian nationality law whereby, in stipulated circumstances, a person loses their citizenship if they reside for five consecutive years outside the territories of the Republic of Indonesia without declaring their intention to retain their citizenship (provided this does not result in statelessness): *Undang-Undang Nomor 12 Tahun 2006 Tentang Kewarganegaraan Republik Indonesia* [Law No 12 of 2006 on Citizenship of the Republic of Indonesia] (Indonesia) art 23(i).

<sup>80</sup> Department of Immigration and Border Protection (Cth), *Dual Citizenship* <<http://www.border.gov.au/Trav/Citi/Curr/Dual-citizenship>>. Legislative restrictions on dual citizenship were repealed in 2002: see generally Symposium, ‘Diversity, Integration and Citizenship’ (2009) 15(1) *Humanities Research* 1.

<sup>81</sup> *Citizenship Act* s 14.



that allow for the revocation or renunciation of a person's citizenship contain safeguards against rendering someone stateless.<sup>82</sup>

However, despite these positive aspects of Australia's legal and policy framework on citizenship, other elements may render a person stateless (or at risk of becoming stateless). These are examined below.

#### *A Prevention of Statelessness: Grant of Nationality to Avoid Statelessness*

Article 1(1) of the *1961 Convention* provides that a contracting state 'shall grant its nationality to a person born in its territory who would otherwise be stateless.' This may be effected either 'at birth, by operation of law,'<sup>83</sup> or 'upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law.'<sup>84</sup>

#### *1 Stateless Children Born in Australia*

Pursuant to s 12(1) of the *Citizenship Act*, a person born in Australia is automatically an Australian citizen:

if and only if:

- (a) a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born; or
- (b) the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.<sup>85</sup>

Section 21(8) provides a potential safeguard against statelessness for children born in Australia to non-citizen or non-resident parents. The provision states:

A person is eligible to become an Australian citizen if the Minister is satisfied that:

- (a) the person was born in Australia; and
- (b) the person:

<sup>82</sup> Ibid ss 33(7), 34(3)(b), 34A(2). Similar safeguards are also contained in provisions on cessation: see below Part V(C).

<sup>83</sup> *1961 Convention* art 1(1)(a).

<sup>84</sup> Ibid art 1(1)(b).

<sup>85</sup> Prior to the passage of the *Australian Citizenship Amendment Act 1986* (Cth), Australia adopted the *jus soli* doctrine in relation to the automatic acquisition of Australian nationality by birth in Australia: Peter Prince, 'We Are Australian — The *Constitution* and Deportation of Australian-Born Children' (Research Paper No 3, Parliamentary Library, Parliament of Australia, 24 November 2003).

- (i) is not a national of any country; and
  - (ii) is not a citizen of any country; and
- (c) the person has:
- (i) never been a national of any country; and
  - (ii) never been a citizen of any country; and
- (d) the person:
- (i) is not entitled to acquire the nationality of a foreign country; and
  - (ii) is not entitled to acquire the citizenship of a foreign country.

Section 24(3) of the *Citizenship Act* provides that the ‘Minister must not approve the person becoming an Australian citizen unless the Minister is satisfied of the identity of the person.’<sup>86</sup> However, if the applicant is eligible to become an Australian citizen pursuant to ss 21(8) and 24(3), then the Minister cannot refuse citizenship.<sup>87</sup> Citizenship begins on the day of approval.<sup>88</sup>

Prior to the entry into force of the *Migration Legislation Amendment Act (No 1) 2008* (Cth), the Minister could refuse approval even if the person was eligible under s 21(8).<sup>89</sup> The Federal Court explained that this provision was changed ‘in order that the Act operate consistently with Australia’s obligations under the *United Nations Convention on the Reduction of Statelessness 1961*’.<sup>90</sup> The non-discretionary nature of conferral following satisfaction of the relevant criteria is now consistent with the *1961 Convention’s* insistence that, subject to certain limitations, ‘no such application may be rejected.’<sup>91</sup>

The Revised Explanatory Memorandum to the Australian Citizenship Bill 2005 (Cth) stated that s 21(8) was intended to ensure ‘that Australia adheres to its obligations under the *Convention on the Reduction of Statelessness* that

<sup>86</sup> Requiring the Minister’s satisfaction is not in itself a breach of the *1961 Convention*, as art 1(1) provides that ‘[a] Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.’

<sup>87</sup> *Citizenship Act* s 24(2).

<sup>88</sup> *Ibid* s 28(2).

<sup>89</sup> *Migration Legislation Amendment Act (No 1) 2008* (Cth) sch 5 item 12, amending *Citizenship Act* s 24(2).

<sup>90</sup> *Shams v Minister for Immigration and Citizenship* (2011) 199 FCR 423, 427 [27] (Jacobson J).

<sup>91</sup> *1961 Convention* art 1(1)(b). However, there is an ability for a contracting state to impose certain conditions: at art 1(2).

no-one born in Australia remain stateless.<sup>92</sup> This is also acknowledged in the Department's *Procedures Advice Manual 3* ('PAM3') with respect to the 'Assessing claims of statelessness guidelines'.<sup>93</sup> However, the discretionary nature of the Minister's decision with regard to an applicant's 'identity' under s 24(3), combined with the lack of guidance provided in the *Citizenship Act* or other relevant legislation or regulations as to the exercise of that discretion, has the potential to limit the protection provided to stateless children born in Australia. The reference to 'identity' is not anchored in the *1961 Convention*: there is no reference to such a requirement in the treaty and hence no comparative insights into its application in practice. As Kim Rubenstein has observed, the incorporation of the 'identity' test means that questions of identity may become central to the application of s 21(8) 'rather than an assessment as to whether the applicant is stateless'.<sup>94</sup>

As we have noted elsewhere, one of the key challenges for stateless persons is 'proving' their identity.<sup>95</sup> On account of not being recognised as a national by any state, stateless persons often do not have documentation as to their citizenship status. This may prevent them from obtaining other forms of identity documentation.<sup>96</sup> Given that applicants for conferral of citizenship under s 21(8) of the *Citizenship Act* are likely to be babies or young children, they will only be able to 'prove' their identity through their parents. Since their situation is likely to result from their parents' inability to transfer nationality (on account of their own statelessness), there is an inherent obstacle.<sup>97</sup>

<sup>92</sup> Revised Explanatory Memorandum, Australian Citizenship Bill 2005 (Cth) 38.

<sup>93</sup> Department of Immigration and Border Protection (Cth), *Procedures Advice Manual 3: Refugee and Humanitarian — Protection Visas — All Applications — Common Processing Guidelines* (16 February 2016) 125 [77].

<sup>94</sup> Kim Rubenstein, 'A Common Understanding of Statelessness' (Paper presented at the Workshop on Researching Statelessness and Citizenship in Asia and the Pacific, Melbourne Law School, January 2016).

<sup>95</sup> Foster, McAdam and Wadley, above n 6. The Australian Government has recognised that this is the case: Onshore Protection Consultative Group, 'Statelessness: Extract of Issues Paper' (4 November 2010), cited in Jane McAdam, 'Position Paper on a Statelessness Determination Procedure for Australia' (Position Paper, Refugee Council of Australia, 29 September 2011) 1 [1] <<https://www.refugeecouncil.org.au/r/s%l/120600-SSD.pdf.pdf>>.

<sup>96</sup> European Network on Statelessness, 'Still Stateless, Still Suffering: Why Europe Must Act Now to Protect Stateless Persons' (Report, 2014) <[http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS\\_Still\\_Stateless\\_Still\\_Suffering\\_online%20version\\_2.pdf](http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Still_Stateless_Still_Suffering_online%20version_2.pdf)>. See also UNHCR, *Handbook on Protection of Stateless Persons*, above n 10.

<sup>97</sup> UNHCR, *Self-Study Module on Statelessness* (2012) 19.

Section 40(1) of the *Citizenship Act* prescribes that the Minister (or an authorised delegate) may request that the applicant, '[f]or the purposes of the Minister being satisfied of the identity of [the applicant] ... provide one or more specified personal identifiers'. Personal identifiers include: 'fingerprints or handprints of a person ... a measurement of a person's height and weight; a photograph or other image of a person's face and shoulders; an iris scan; [and] a person's signature'.<sup>98</sup>

However, there are no guidelines available as to what information the Minister (or an authorised delegate) will take into account when making an initial assessment as to an applicant's identity with respect to an assessment under s 21(8) of the *Citizenship Act*. Similarly, there are no guidelines as to what standard of proof is required, and on whom the burden falls, with respect to a conferral of citizenship under that provision.<sup>99</sup> Additionally, the term 'identity' is not defined in the *Citizenship Act* or any other relevant legislation or regulations. There is no information on the Department's website (or otherwise publicly available) about the application process for conferral of citizenship under s 21(8), and the conferral of citizenship form does not include the option of conferral pursuant to that section.<sup>100</sup>

At the time of writing, there were only two published tribunal decisions about the application of s 21(8) (conferral). In the first decision, the applicant (AP) was born in Australia in 2010 to a Nepalese mother and an unidentified

<sup>98</sup> *Citizenship Act* ss 10(1)(a)–(e).

<sup>99</sup> The extent of the guidance provided to decision-makers is as follows: 'Applications which are considered to meet the requirements of this section must be referred to [the] Citizenship Policy Section through the Citizenship Helpdesk': Department of Immigration and Border Protection (Cth), *Australian Citizenship Instructions* (2015) 62 [5.14.2]. The Instructions further state, at 1, that:

The instructions provide guidance on policy in relation to the interpretation of, and the exercise of powers under, the Act and the Regulations. Decision-makers should be mindful that policy must not be applied inflexibly. Policy cannot constrain the exercise of delegated powers under the Act.

Similarly, the instructions on s 24(3) identity requirements state, at 85 [5.27.2], that:

Section 24(3) requires that the Minister must not approve the person becoming an Australian citizen unless the Minister is satisfied of the identity of the person. In addition to being a legislative requirement under the Act, the Australian community expects that decision-makers will not approve a person for citizenship if they are not satisfied of the person's identity.

<sup>100</sup> Department of Immigration and Border Protection (Cth), *Form 1290: Application for Australian Citizenship — Other Situations* (2016). The first few pages of the form, which discuss 'eligibility' to apply for citizenship via this form, do not specify the statelessness safeguard provided for by 21(8) of the *Citizenship Act*.

father, who was thought to be either an Indian or a Bangladeshi national.<sup>101</sup> AP and the mother had previously applied for a protection visa, and although unsuccessful, the Department had found AP to be stateless.<sup>102</sup> While the Tribunal was satisfied that AP could not acquire Nepalese citizenship, it was not satisfied that he was *not* entitled to acquire Indian or Bangladeshi citizenship.<sup>103</sup> Part of the reasoning was that an alleged defect in acquiring such citizenship (absence of birth registration with the consulate) could be remedied at any time. Importantly — and contrary to the Department’s submissions — the Tribunal accepted that someone who genuinely had no information about his or her paternity could fall within the terms of s 21(8)(d) of the *Citizenship Act*, and further that Australian citizenship should not be refused if there was ‘irrefutable evidence that the person had no prospect of satisfying the procedural and administrative citizenship application requirements of the relevant foreign country.’<sup>104</sup>

The second decision related to a child born in Australia to parents of Cuban descent, who had lost their Cuban citizenship by residing for an extended period outside that country.<sup>105</sup> The Tribunal made a number of pertinent observations in relation to s 21(8). First, a decision-maker is only required to consider countries ‘whose citizenship a claimant is potentially entitled to acquire’, not every country in the world.<sup>106</sup> Secondly, the relevant temporal aspect is whether the applicant is ‘*currently* entitled to acquire it’ (not whether it may be possible at some future point in time).<sup>107</sup> Thirdly, the focus is on the entitlement to ‘*acquire* citizenship’, not simply to apply for it.<sup>108</sup>

In this respect, while someone ‘with an apparent entitlement to acquire the citizenship of another country cannot claim to be *not entitled* to do so simply because mandatory, but straightforward, evidentiary or procedural steps have not been undertaken,’<sup>109</sup> one must not wholly exclude practical considerations

<sup>101</sup> *Re AP and Minister for Immigration and Border Protection* [2014] AATA 706 (29 September 2014) (*‘Re AP’*).

<sup>102</sup> *Ibid* [2] (Senior Member Taylor).

<sup>103</sup> *Ibid* [62].

<sup>104</sup> *Ibid* [56].

<sup>105</sup> *KKRG and Minister for Immigration and Border Protection* [2015] AATA 635 (27 August 2015) (*‘KKRG’*).

<sup>106</sup> *Ibid* [19] (Deputy President Frost).

<sup>107</sup> *Ibid* [24] (emphasis in original).

<sup>108</sup> *Ibid* [25] (emphasis in original).

<sup>109</sup> *Ibid* [23] (emphasis in original), following the approach in *Re AP* [2014] AATA 706 (29 September 2014).

from the application process.<sup>110</sup> In the instant case, the Tribunal found that there were ‘significant barriers to the applicant’s acquisition of Cuban citizenship’<sup>111</sup> that made it ‘impossible, in any practical sense, for the applicant to acquire Cuban citizenship.’<sup>112</sup> The Tribunal found that:

The steps that have to be taken amount to an effective prohibition against the applicant’s acquisition of Cuban citizenship. They are not merely ‘procedural’; they are so onerous that they negate his underlying eligibility for Cuban citizenship. The applicant is not entitled to acquire the citizenship of Cuba because the barriers placed in his path by the Cuban government effectively prevent him from doing so.<sup>113</sup>

As such, the applicant was eligible to become an Australian citizen.

The high-profile ‘baby Ferouz’ case raises the question of the application of s 21(8) in relation to babies born to stateless asylum seekers who came to Australia by boat.<sup>114</sup> While there is no comprehensive analysis of how many children are in this situation, he is certainly not the only one.<sup>115</sup> Evidence

<sup>110</sup> *KKRG* [2015] AATA 635 (27 August 2015) [26] (Deputy President Frost), quoting *Re AP* [2014] AATA 706 (29 September 2014) [56] (Senior Member Taylor).

<sup>111</sup> *KKRG* [2015] AATA 635 (27 August 2015) [30] (Deputy President Frost).

<sup>112</sup> *Ibid* [31].

<sup>113</sup> *Ibid*.

<sup>114</sup> *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348 (15 October 2014), *affd* (2014) 227 FCR 494. See also Nick Olle, ‘The Law and the Little Boy’, *The Global Mail* (online), 11 December 2013 <[https://law.anu.edu.au/sites/all/files/coast/the\\_law\\_and\\_the\\_little\\_boy\\_the\\_global\\_mail.pdf](https://law.anu.edu.au/sites/all/files/coast/the_law_and_the_little_boy_the_global_mail.pdf)>; Louisa Rebgetz, ‘Baby Ferouz Not Entitled to Protection Visa, Federal Court Judge Rules’, *ABC News* (online), 16 October 2014 <<http://www.abc.net.au/news/2014-10-15/baby-ferouz-not-entitled-to-protection-visa-judge-rules/5816456>>; Australian Associated Press, ‘Asylum-Seeker Fight for Baby’s Refugee Status Goes to Federal Court’, *The Guardian* (online), 16 June 2014 <<http://www.theguardian.com/world/2014/jun/16/asylum-seeker-babys-fight-for-refugee-status-goes-to-federal-court>>; Max Chalmers, ‘Deal Supposed to Help Children Will Likely Send 25 Babies to Offshore Detention’, *New Matilda* (online), 5 December 2014 <<https://newmatilda.com/2014/12/05/deal-supposed-help-children-will-likely-send-25-babies-offshore-detention/>>; Jane McAdam et al, Submission No 167 to Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, 23–5.

<sup>115</sup> A publication by Refugee Advice and Casework Service details that 31 stateless children had been born in Australia at the time of its publication (late 2014): Refugee Advice and Casework Service, *Plaintiff B16A by His Litigation Guardian B16B & Ors v Minister for Immigration and Border Protection & Anor* (2014). The Australian Human Rights Commission reported that, between 1 October 2013 and the date of the report’s publication in late 2014, ‘at least 12 babies ha[d] been born in detention to mothers who have no recorded nationality’:

recently presented to the Australian Senate suggests that there are currently 38 such children.<sup>116</sup> Of those who have lodged an application for citizenship pursuant to s 21(8) of the *Citizenship Act*, few have so far obtained a decision in relation to his or her application.

Section 21(8) of the *Citizenship Act* does not condition eligibility on any particular immigration status or visa, although it does require that ‘the person was born in Australia’.<sup>117</sup> In 2014, the *Migration Act 1958* (Cth) (*‘Migration Act’*) was amended to provide that a child ‘born in the migration zone’ is ‘an unauthorised maritime arrival’ if ‘a parent of the person is, at the time of the person’s birth, an unauthorised maritime arrival’, and ‘the person is not an Australian citizen at the time of birth’.<sup>118</sup> However, despite the legal fiction that deems a person born in Australia to be an ‘unauthorised maritime arrival’ for the purposes of the *Migration Act*, it could not plausibly be denied that the person was ‘born in Australia’ for the purposes of the *Citizenship Act*. On the contrary, the *1961 Convention* dictates a broad interpretation of the concept of birth in a state’s territory in providing that:

For the purpose of determining the obligations of Contracting States under this *Convention*, birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State whose flag the ship flies or in the territory of the State in which the aircraft is registered ...<sup>119</sup>

It is also well established that a state cannot circumvent its international obligations by artificially deeming its territory to be excised or otherwise outside the purview of international law.<sup>120</sup>

## 2 Access to Australian Citizenship for Those Who Arrive in Australia as Stateless Persons

If a stateless asylum seeker meets the criteria in s 36 of the *Migration Act*, he or she may be eligible for protection in Australia (as a refugee or beneficiary of complementary protection).<sup>121</sup> However, the form of protection to which

Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 90.

<sup>116</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 5 May 2016, 27–8 (Sarah Hanson-Young).

<sup>117</sup> *Citizenship Act* s 21(8)(a).

<sup>118</sup> *Migration Act 1958* (Cth) s 5AA(1A).

<sup>119</sup> *1961 Convention* art 3.

<sup>120</sup> *Amuur v France* [1996] III Eur Court HR 826, 836–7 [20], 851–2 [52]–[54].

<sup>121</sup> Foster, McAdam and Wadley, above n 6.

the applicant is entitled is determined by the applicant's mode of arrival into Australia. If the stateless applicant is deemed to have arrived in Australia lawfully and satisfies the criteria in s 36, the applicant will be eligible for a Protection Visa (Subclass 866).<sup>122</sup> A Protection Visa holder can apply for Australian citizenship if he or she satisfies the eligibility requirements, which include inter alia residency requirements,<sup>123</sup> and 'good character'.<sup>124</sup>

However, if the applicant is deemed to have 'arrived in Australia illegally', he or she will only be eligible for a Temporary Protection Visa (Class XD, Subclass 785) or a Safe Haven Enterprise Visa (Class XE, Subclass 790), which do not provide the applicant with a direct pathway to apply for Australian citizenship.<sup>125</sup> This would appear to be inconsistent with art 34 of the *Refugee Convention* and art 32 of the *1954 Convention*, which provide in identical terms, that state parties 'shall as far as possible facilitate the assimilation and naturalization of' refugees and stateless persons respectively.

Stateless persons who arrive in Australia via the Refugee and Humanitarian Program are granted a Permanent Protection Visa and yet, as the Refugee Council of Australia has observed, may face significant barriers to acquiring Australian citizenship, even if they are granted permanent residency and are prima facie eligible. For example, the application fees are likely to be beyond the means of 'some refugee and humanitarian entrants'.<sup>126</sup> Additionally, the requirement that an applicant must successfully complete the Australian Citizenship Test may be unattainable due to 'little or no English language skills', a 'history of disrupted education' or even a history of no access to formal education.<sup>127</sup> The Refugee Council of Australia highlights that 'some

<sup>122</sup> Department of Immigration and Border Protection (Cth), *Protection Visa (Subclass 866)* <<http://www.border.gov.au/Trav/Visa-1/866->>. The Department's website notes that 'illegal maritime arrival' and 'unauthorised air arrival' are the two methods of illegal entry. *Migration Regulations 1994* (Cth) reg 2.08F sets out the circumstances in which an application for a Protection (Class XA) Visa is taken to be an application for a Temporary Protection (Class XD) Visa.

<sup>123</sup> *Citizenship Act* ss 21(2)(b)-(c), (3)(b)-(c), (4)(b), (d), (5)(b), 22-22B.

<sup>124</sup> *Ibid* ss 21(2)(h), (3)(f), (4)(f), (6)(d), (7)(d).

<sup>125</sup> When a person's Temporary Protection Visa expires, he or she can only apply for another Temporary Protection Visa or a Safe Haven Enterprise Visa. When a person's Safe Haven Enterprise Visa expires, he or she may be eligible to apply for a different temporary or permanent onshore visa: Department of Immigration and Border Protection (Cth), *Visa Options for Illegal Arrivals Seeking Protection* <<https://www.border.gov.au/Trav/Refu/protection-application-information-and-guides-paig/visa-options-for-illegal-arrivals-seeking-protection>>.

<sup>126</sup> Refugee Council of Australia, *Statelessness in Australia* (2015) 16.

<sup>127</sup> *Ibid*.



refugee and humanitarian entrants may choose not to attempt the test at all because they have not yet attained a sufficient level of English.<sup>128</sup> Since stateless persons typically face barriers in accessing education, stateless Protection Visa holders are likely to be disproportionately affected by the Australian Citizenship Test requirement. In addition to these barriers, the Refugee Council of Australia has also observed considerable delays in the processing of Permanent Protection Visa holders' citizenship applications.<sup>129</sup>

### 3 *Children Born Outside Australia to an Australian Citizen*

Australian citizenship law does not prevent children born to Australian citizens overseas from becoming stateless. Pursuant to s 16(2) of the *Citizenship Act*, a child born overseas to an Australian citizen is not automatically an Australian citizen by operation of law, and must instead apply for Australian citizenship. Such an application must be refused if the Minister is not satisfied as to the person's identity,<sup>130</sup> if the person has been 'convicted of a national security offence',<sup>131</sup> or '[i]f the person has at any time ceased to be an Australian citizen ... during the period of 12 months starting on the day on which the person ceased, or last ceased, to be an Australian citizen.'<sup>132</sup> Accordingly, this provision has the effect that if a person born overseas to an Australian citizen does not apply for Australian citizenship, and does not acquire an alternative nationality, then he or she could be at risk of becoming stateless if any of the conditions above are satisfied.

One context in which this may be a live issue is surrogacy involving Australian citizens who engage the services of surrogate parents overseas. Because commercial surrogacy is not legal in any Australian state or territory,<sup>133</sup> some Australian citizens have sought the option of offshore commercial surrogacy.

<sup>128</sup> Ibid.

<sup>129</sup> Refugee Council of Australia, *Delays in Citizenship Applications for Permanent Refugee Visa Holders* (2015) 3. See, eg, *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 (16 December 2016).

<sup>130</sup> *Citizenship Act* s 17(3).

<sup>131</sup> Ibid s 17(4A). '[N]ational security offence' is defined in s 3. Thus, although suspected past criminal acts (that would satisfy the exclusion under art 33(2) of the *Refugee Convention*) do not automatically preclude a grant of citizenship if the person is of 'good character at the time of the Minister's decision' (ibid s 16(2)(c)), citizenship must be denied if the person (even if stateless) has been convicted of a national security offence.

<sup>132</sup> *Citizenship Act* s 17(5).

<sup>133</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) v.

However, as Jyothi Kanics observes, '[i]nternational surrogacy presents a very specific contemporary challenge [to statelessness] because in such cases it may be difficult for the child's legal parentage to be established or recognised.'<sup>134</sup> Kanics explains that:

The child may be able to demonstrate a relation to several adults such as: a genetic link to a biological intending parent, a social link to the other intending parent as well as a link to the gestational surrogate mother. Although the intending parents and surrogate mother will most likely all possess a nationality, it may not be possible for them to pass this on to the child. Furthermore, it may be impossible for the child to acquire either the nationality of the State of his or her birth or the nationality of his or her parents (intending parents or surrogate mother).<sup>135</sup>

Recent high-profile overseas surrogacy cases involving Australians have illuminated the risks involved for children in such arrangements, including ultimately being rendered stateless.<sup>136</sup> Partly in response to these cases, the House of Representatives Standing Committee on Social Policy and Legal Affairs recently undertook an inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements. It recommended that, *inter alia*:

the Australian Government establish an interdepartmental taskforce (which should include eminent jurists with relevant expertise) to report in 12 months on ways to address the situation of Australians who choose [to] enter into offshore surrogacy arrangements, with respect to: protecting the rights of the child ...<sup>137</sup>

This relatively new challenge to the prevention of statelessness indicates that ongoing vigilance is necessary. As the UNHCR notes, despite renewed

<sup>134</sup> Jyothi Kanics, 'Preventing and Addressing Statelessness: In the Context of International Surrogacy Arrangements' (2014) 19 *Tilburg Law Review* 117, 119 (citations omitted).

<sup>135</sup> *Ibid* (citations omitted). Other scholars have identified surrogacy as potentially having an impact on statelessness: Sanoj Rajan, 'Transnational Surrogacy and Statelessness' (Paper presented at the Workshop on Researching Statelessness and Citizenship in Asia and the Pacific, Melbourne Law School, January 2016).

<sup>136</sup> See, eg, Samantha Hawley, Suzanne Smith and Michael McKinnon, 'India Surrogacy Case: Documents Show New South Wales Couple Abandoned Baby Boy Despite Warnings', *ABC News* (online), 13 April 2015 <<http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>>.

<sup>137</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 133, xiii (recommendation 7).

attention to the issue and positive ‘actions of many States to prevent or reduce statelessness ... new cases of statelessness [clearly] continue to arise.’<sup>138</sup>

#### 4 *Potential Barriers to Citizenship: Deficiencies in Birth Registration in Australia*

The final issue to consider in this context is a procedural one. Birth registration is an important tool for the prevention of statelessness because it establishes a legal record of where a child was born and to whom.<sup>139</sup> If a birth is unregistered and access to nationality is not pursued, children may grow up to become stateless adults.<sup>140</sup> Such adults are then incapable of conferring nationality on their own children, and statelessness may be perpetuated inter-generationally.<sup>141</sup>

The importance of birth registration is reflected in the fact that one of the ten UNHCR actions to end statelessness by 2024 is to ‘[e]nsure birth registration for the prevention of statelessness.’<sup>142</sup> As the UNHCR acknowledges, ‘lack of birth registration on its own does not usually make people stateless,’<sup>143</sup> but ‘[i]ndividuals can [certainly] be at risk of statelessness’ without it.<sup>144</sup> The increased focus on birth registration as essential to establishing identity is also reflected in the fact that one of the Sustainable Development Goals — the goal to promote just, peaceful and inclusive societies — includes as a concrete objective the provision of ‘legal identity for all, including birth registration,’ by 2030.<sup>145</sup>

<sup>138</sup> UNHCR, *Handbook on Protection of Stateless Persons*, above n 10, 1.

<sup>139</sup> UNHCR, ‘Birth Registration’ (Child Protection Issue Brief, UNHCR, August 2013); UNHCR, *Guidelines on Statelessness No 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness*, UN Doc HCR/GS/12/04 (21 December 2012) 12 [55] (‘Guidelines on Statelessness No 4’).

<sup>140</sup> UNHCR, *Self-Study Module on Statelessness*, above n 97, 19; Maureen Lynch and Melanie Teff, ‘Childhood Statelessness’ (2009) 32 *Forced Migration Review* 31; UNHCR, ‘Birth Registration’, above n 139; Simon Heap and Claire Cody, ‘The Universal Birth Registration Campaign’ (2009) 32 *Forced Migration Review* 20.

<sup>141</sup> Inge Sturkenboom, *Under the Radar and Under Protected: The Urgent Need to Address Stateless Children’s Rights* (8 November 2012) European Network on Statelessness <<http://www.statelessness.eu/blog/under-radar-and-under-protected-urgent-need-address-stateless-children%E2%80%99s-rights>>.

<sup>142</sup> UNHCR, *Global Action Plan*, above n 4, 3 (action 7).

<sup>143</sup> *Ibid* 19.

<sup>144</sup> *Ibid* 18.

<sup>145</sup> UN, *Goal 16: Promote Just, Peaceful and Inclusive Societies — Goal 16 Targets*, Sustainable Development Goals: 17 Goals to Transform Our World <<http://www.un.org/sustainabledevelopment/peace-justice/>>. As discussed in UN, *The*

To be clear, a failure to register a birth does not render someone stateless as a matter of law. However, ‘registration of the birth provides proof of descent and of place of birth and therefore underpins implementation of the 1961 *Convention* and related human rights norms.’<sup>146</sup> Without it, a person may find it exceptionally difficult to prove who they are in order to have their nationality recognised. Non-registration of birth is an avoidable, but all too frequent, cause of statelessness, and as Laura van Waas notes, it can be difficult to know ‘where to draw the line between the simple lack of documentation and a case of statelessness.’<sup>147</sup> This is why ‘[o]ne of the best means of avoiding statelessness is to ensure recognition of an individual’s genuine and effective link with a State, based on identifiable factors including place of birth, descent, and residency.’<sup>148</sup>

Article 7(1) of the *Convention on the Rights of the Child*, art 24(2) of the *ICCPR* and art 18(2) of the *Convention on the Rights of Persons with Disabilities* provide that a child must be registered ‘immediately after birth’. The right to immediate birth registration is a distinct and separate right by which the state records and acknowledges the existence and legal personality of a

*Sustainable Development Agenda*, Sustainable Development Goals: 17 Goals to Transform Our World <<http://www.un.org/sustainabledevelopment/development-agenda/>>:

On 1 January 2016, the 17 Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development — adopted by world leaders in September 2015 at an historic UN Summit — officially came into force. Over the next fifteen years, with these new Goals that universally apply to all, countries will mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no-one is left behind.

The SDGs, also known as Global Goals, build on the success of the Millennium Development Goals (MDGs) and aim to go further to end all forms of poverty. The new Goals are unique in that they call for action by all countries, poor, rich and middle-income to promote prosperity while protecting the planet. They recognize that ending poverty must go hand-in-hand with strategies that build economic growth and addresses [sic] a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection.

While the SDGs are not legally binding, governments are expected to take ownership and establish national frameworks for the achievement of the 17 Goals. Countries have the primary responsibility for follow-up and review of the progress made in implementing the Goals, which will require quality, accessible and timely data collection. Regional follow-up and review will be based on national-level analyses and contribute to follow-up and review at the global level.

<sup>146</sup> *Guidelines on Statelessness No 4*, UN Doc HCR/GS/12/04, 12 [55].

<sup>147</sup> van Waas, *Nationality Matters*, above n 15, 196.

<sup>148</sup> Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’, above n 1, 168 (citations omitted).

child.<sup>149</sup> The UN Committee on the Rights of the Child has interpreted immediate birth registration to mean that it should take place as soon as practically possible, within ‘days rather than months’ after birth.<sup>150</sup> The ‘right to a birth certificate is necessarily implied into the right to [immediate] birth registration’,<sup>151</sup> since ‘[i]t is the birth certificate that provides the substance to the right to birth registration.’<sup>152</sup> The UN Committee on the Rights of the Child has recommended that a standard birth certificate should be provided free of charge at the time of the registration of the birth.<sup>153</sup>

In Australia, it is a legal requirement to register the birth of a child in each state and territory.<sup>154</sup> However, ‘birth registration is not automatic upon the birth of a child, and a birth certificate is not automatically issued upon birth registration.’<sup>155</sup> To register a birth in Australia, parents or guardians must complete and submit a birth registration application to the relevant state or territory authority. The required supporting documents and fees to apply for a birth certificate vary between each state and territory.<sup>156</sup>

The Minimbah Project, an Australian non-governmental organisation that assists young Australians with birth registration processes, estimates that ‘[a]pproximately 35 000 children (12% of [annual births]) fail to have their

<sup>149</sup> See UN Children’s Fund, *Implementation Handbook for the Convention on the Rights of the Child* (UN Children’s Fund, 3<sup>rd</sup> ed, 2007) 97–8 (citations omitted).

<sup>150</sup> *Ibid* 100.

<sup>151</sup> Paula Gerber, Andy Gargett and Melissa Castan, ‘Does the Right to Birth Registration Include a Right to a Birth Certificate?’ (2011) 29 *Netherlands Quarterly of Human Rights* 434, 436.

<sup>152</sup> *Ibid* 435.

<sup>153</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations — Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 9 [36] (‘Concluding Observations — Australia’). See Guidelines on Statelessness No 4, UN Doc HCR/GS/12/04, 11 [54].

<sup>154</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 7(1); *Births, Deaths and Marriages Registration Act 1995* (NSW) s 13(1); *Births, Deaths and Marriages Registration Act 1996* (NT) s 13(1); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 6(1)(a); *Births, Deaths and Marriages Registration Act 1996* (SA) s 13(1); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 12(1); *Births, Deaths and Marriages Registration Act 1996* (Vic) s 13(1); *Births, Deaths and Marriages Registration Act 1998* (WA) s 13(1).

<sup>155</sup> Gerber, Gargett and Castan, above n 151, 437.

<sup>156</sup> See, eg, *Births, Deaths and Marriages Victoria*, Department of Justice and Regulation (Vic), *Fees* (13 January 2017) <<http://www.bdm.vic.gov.au/utility/about+bdm/fees/>>; Registry of Births, Deaths and Marriages, Department of Justice (NSW), *Birth Certificate* (28 November 2016) <<http://www.bdm.nsw.gov.au/Pages/births/birth-certificate.aspx>>.

births registered ... in their first year of life.<sup>157</sup> Further, they estimate that ‘tens of thousands of Australian citizens across all age groups remain unregistered throughout their lives.’<sup>158</sup> This is thought to be due to a number of barriers, including ‘onerous identity requirements to obtain a birth certificate’,<sup>159</sup> poor literacy, a lack of understanding of procedures, administrative costs, a lack of knowledge of the importance and advantages of birth registration, and a lack of support from authorities.<sup>160</sup>

Groups that are most commonly affected include culturally and linguistically diverse communities (including refugees)<sup>161</sup> and Indigenous peoples. Gerber and Castan observe that:

a number of Australians — predominantly Indigenous people and those from culturally and linguistically diverse ... communities — miss out on the benefits of citizenship and struggle to fully participate in society because their birth has never been registered ...<sup>162</sup>

Indeed, these issues have not escaped international scrutiny: the UN Committee on the Rights of the Child has urged Australia ‘to review its birth registration process in detail to ensure that all children born in Australia are registered at birth, and that no child is disadvantaged due to procedural barriers to registration.’<sup>163</sup>

For children born in immigration detention in Australia or in a regional processing country, there may be an additional practical difficulty in accessing birth registration. For children born to asylum seekers in Australia, the Department of Immigration and Border Protection has indicated that ‘contracted service providers are required to assist the parents to register the

<sup>157</sup> Will Winter, ‘The Minimih Project: Facilitating Birth Registration and Birth Certificates in Rural and Regional Communities’ in Melissa Castan and Paula Gerber (eds), *Proof of Birth* (Future Leaders, 2015) 73, 78.

<sup>158</sup> *Ibid* 79.

<sup>159</sup> Aivee Robinson et al, UN Children’s Fund Australia, ‘Birth Registration’, Submission to the Office of the High Commissioner for Human Rights, November 2013, 2.

<sup>160</sup> Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report (2013) 24 [3.47] quoting *Concluding Observations — Australia*, UN Doc CRC/C/AUS/CO/4, 8–9 [35].

<sup>161</sup> Many asylum seekers have also experienced discrimination and disenfranchisement by authorities in their country of origin or country of former habitual residence, and may have little knowledge of the right to, and requirements for, birth registration: see Heap and Cody, above n 140, 20.

<sup>162</sup> Paula Gerber and Melissa Castan, ‘The Right to Universal Birth Registration in Australia’ in Melissa Castan and Paula Gerber (eds), *Proof of Birth* (Future Leaders, 2015) 3, 3.

<sup>163</sup> *Concluding Observations — Australia*, UN Doc CRC/C/AUS/CO/4, 9 [36].

baby's birth and to obtain a birth certificate' and that the costs associated with the submission of completed registration forms are borne by the Department.<sup>164</sup> The onus is thus squarely on Australian authorities to ensure that such children have their birth registered and acquire a birth certificate. This applies both in relation to asylum seekers in immigration detention and those in the community.

Under Australian law, asylum seekers who arrive without a valid visa may be transferred to another country for processing and (if found to be in need of protection), for settlement. Nauru and Papua New Guinea are designated regional processing countries under s 198AB of the *Migration Act*.<sup>165</sup> Pregnant asylum seekers in Nauru are normally returned to Australia for their babies' birth,<sup>166</sup> although in September 2015, a child was born to an asylum seeker in Nauru.<sup>167</sup>

There is no information publically available as to the process followed by the Department for registering the births of children whose mothers have been transferred to Australia from a regional processing country.<sup>168</sup> In its report on the Migration and Maritime Powers Legislation Amendment

<sup>164</sup> Letter from Scott Morrison, Minister for Immigration and Border Protection, to Misha Coleman, Australian Churches Refugee Taskforce, 12 February 2014 <<http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2014/05/MorrisonResponse.pdf>>. It is unclear whether this includes assistance to apply for both birth registration and a birth certificate. It has been revealed that Serco, the service provider for Australian onshore immigration detention centres, is not required to record births in detention, and so it is unclear how the Department is informed of births in onshore detention centres in Australia: Paul Farrell, 'Immigration Detention Centres No Longer Formally Report Childbirth', *The Guardian* (online), 25 November 2013 <<http://www.theguardian.com/world/2013/nov/25/immigration-detention-centres-no-longer-formally-report-childbirth>>.

<sup>165</sup> Neither country has ratified either statelessness treaty, although both have ratified the *Convention on the Rights of the Child*, Papua New Guinea has ratified the *ICCPR* and Nauru has signed but not ratified the *ICCPR*.

<sup>166</sup> Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 83 [3.113]; Australian Human Rights Commission, above n 115, 89.

<sup>167</sup> Neelima Choahan, 'Birth of First Refugee Baby on Nauru Sets "Risky Precedent"', *The Sydney Morning Herald* (online), 21 September 2015 <<http://www.smh.com.au/national/birth-of-first-refugee-baby-in-nauru-detention-centre-sets-risky-precedent-20150921-gjrhke.html>>.

<sup>168</sup> Michelle Foster, Jane McAdam and Davina Wadley, Submission No 5 to Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Protecting Babies Born in Australia) Bill 2014*, 29 August 2014, 8, which details the authors' concerns regarding the risks associated with non-registration of births before they are transferred to offshore processing centres.

(Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), the Senate Legal and Constitutional Affairs Legislation Committee recommended that ‘the Department of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.’<sup>169</sup> However, based on desk research, it is not clear whether this recommendation has been adopted.

If an asylum seeker gives birth in a regional processing country, there is no information publically available as to the process followed to ensure that the birth is registered immediately (or at all). Australia cannot relieve itself of its international obligations with respect to birth registration simply by sending asylum seekers to other countries for processing.<sup>170</sup> The *Births, Deaths and Marriages Ordinance 1957* (Nauru) requires a parent of a child born on Nauru to notify the Registrar of ‘such information as the Registrar requires for the purpose of registering the birth’ within 21 days of the birth.<sup>171</sup> Further:

Where the notification of the birth of a child cannot be given by a parent of the child, the occupier of the building or place where the child is born shall, within twenty-one days after the date of the birth, notify the Registrar of the birth and furnish to the Registrar such information as the Registrar requires for the purpose of registering the birth.<sup>172</sup>

Although Nauru has not ratified the *1961 Convention*, the *Constitution of Nauru* (Nauru) provides that a child may acquire Nauruan citizenship by birth if he or she would otherwise be stateless.<sup>173</sup> This means that stateless

<sup>169</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (2014) 40 [3.74].

<sup>170</sup> Australia is responsible for the actions of its officials both within and outside of Australian territory, including within the territory of other sovereign states, such as Nauru and Papua New Guinea: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 27, 29. See, eg, *Amuur v France* [1996] III Eur Court HR 826; Ian Brownlie, *System of the Law of Nations: State Responsibility — Part I* (Oxford University Press, 1983) 135–7; *MSS v Belgium* [2011] I Eur Court HR 255; *NS v Secretary of State for the Home Department* (C-411/10, C-493/10) [2011] ECR I-13991. The High Court of Australia has acknowledged Australia’s legal responsibility in the regional processing regime: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 70 [41] (French, CJ, Kiefel and Nettle JJ), 84–5 [93] (Bell J), 108–9 [173]–[175] (Gageler J), 137 [292], 146 [323], 152–4 [353]–[355] (Gordon J).

<sup>171</sup> *Births, Deaths and Marriages Ordinance 1957* (Nauru) s 7(1).

<sup>172</sup> *Ibid* s 7(2).

<sup>173</sup> *Constitution of Nauru* (Nauru) s 73: ‘A person born in Nauru on or after the thirty-first day of January One thousand nine hundred and sixty-eight is a Nauruan citizen if, at the date of



children born in Nauru may be able to acquire Nauruan nationality. However, this is by no means clear and remains an issue of ongoing concern.

B *Challenges to the Prevention of Statelessness:  
Withdrawal and Loss of Nationality*

Under Australian law there are several ways in which a person may cease to be a citizen.<sup>174</sup> These include renunciation of citizenship;<sup>175</sup> revocation on the grounds of offences or fraud;<sup>176</sup> failure to comply with special residency requirements for those whose citizenship was not automatic;<sup>177</sup> serving in the armed forces of a country at war with Australia or a declared terrorist organisation;<sup>178</sup> or through other conduct that ‘demonstrates that the person has repudiated their allegiance to Australia.’<sup>179</sup> It is noteworthy that many of these categories apply to all Australian citizens, regardless of whether citizenship was acquired automatically by birth or through naturalisation. The last of these was introduced in 2015 by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*‘Allegiance to Australia Act’*) and is considered separately in Part V(C) below. While the *Citizenship Act* safeguards against statelessness in some of these instances,<sup>180</sup> it does not provide complete protection.

Pursuant to s 34(1) of the *Citizenship Act*, the Minister may revoke Australian citizenship acquired by descent (or adoption) if a person has been convicted of an offence in relation to his or her application to become an Australian citizen, or obtained Australian citizenship as a result of third-party fraud. In both cases, the Minister must be ‘satisfied that it would be contrary

his birth he would not, but for the provisions of this Article, have the nationality of any country.’

<sup>174</sup> *Citizenship Act* pt 2 div 3. For a detailed analysis see Sangeetha Pillai, ‘The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis’ (2014) 37 *Melbourne University Law Review* 736, 753–8.

<sup>175</sup> *Citizenship Act* ss 33, 33AA.

<sup>176</sup> *Ibid* s 34.

<sup>177</sup> *Ibid* s 34A.

<sup>178</sup> *Ibid* s 35.

<sup>179</sup> *Ibid* s 35A(1)(d), as inserted by *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 1 item 5.

<sup>180</sup> The *Citizenship Act* provides some protection in relation to: renunciation by application (s 33(7)); offences or fraud (s 34(3)(b)); special residency requirements (s 34A(2)); a responsible parent’s cessation of citizenship (s 36(3)).

to the public interest for the person to remain an Australian citizen.<sup>181</sup> The term ‘public interest’ is not defined, and neither the Act itself, nor any associated legislation or regulations, sets out the test to be applied. The Act does not contain any safeguards against being rendered stateless where citizenship is revoked in such circumstances.<sup>182</sup> Section 21(8) of the *Citizenship Act* does not provide a remedy since it applies only to persons who have *never* been citizens of any country (and who are not entitled to acquire the citizenship of another country, who are not a citizen of any country and who were born in Australia).

Article 8(1) of the 1961 *Convention* provides that a state ‘shall not deprive a person of its nationality if such deprivation would render him stateless’, although it importantly contains an exception in art 8(2)(b) ‘where the nationality has been obtained by misrepresentation or fraud.’ However, the *Citizenship Act* provisions are arguably wider than the permissible exception set by the 1961 *Convention* in that they apply to ‘third-party fraud’ — namely, where *another person* has been convicted of a specified offence which ‘was connected with the Minister approving the applicant becoming an Australian citizen.’<sup>183</sup> There is no requirement that the applicant knew about or was in any way involved in the relevant offence.

### C *New Challenges to the Prevention and Reduction of Statelessness: National Security, Terrorism and the Withdrawal of Citizenship*

In 2015, the *Allegiance to Australia Act* entered into force:

because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.<sup>184</sup>

While the *Citizenship Act* has long contained a provision permitting cessation of citizenship where a person ‘is a national or citizen of a country other than Australia’ and ‘serves in the armed forces of a country at war with Australia’,<sup>185</sup>

<sup>181</sup> *Ibid* s 34(1)(c).

<sup>182</sup> In contrast, the Minister cannot revoke Australian citizenship acquired by conferral if it would render the person stateless: *ibid* s 34(3)(b).

<sup>183</sup> *Ibid* s 34(8).

<sup>184</sup> *Allegiance to Australia Act* s 4.

<sup>185</sup> *Citizenship Act* s 35(1).

the new provisions extend far beyond this. As Sangeetha Pillai has observed, the *Allegiance to Australia Act* ‘represents the most significant expansion of the grounds for citizenship loss in Australia since Australian citizenship legislation first entered into force in 1949.’<sup>186</sup> Although representing a radical shift in Australian citizenship law, the amendments reflect a recent legislative trend to introduce or widen powers of denationalisation in other common law countries, such as the UK,<sup>187</sup> Canada,<sup>188</sup> Israel,<sup>189</sup> and some European states<sup>190</sup> in response to concerns about the threat to national security posed by so-called ‘foreign fighters.’<sup>191</sup> However, in many respects Australia’s provisions extend beyond both the enacted and proposed measures in other comparable states.<sup>192</sup> Moreover, recent developments — including the withdrawal of a

<sup>186</sup> Sangeetha Pillai, ‘Citizenship-Stripping Reforms Open to Challenge in Spite of Safeguards’ (2016) 3(19) *LSJ: Law Society of NSW Journal* 74, 74.

<sup>187</sup> See Guy S Goodwin-Gill, *Deprivation of Citizenship Resulting in Statelessness and Its Implications in International Law: Further Comments* (6 April 2014) <<http://www.kaldorcentre.unsw.edu.au/sites/default/files/gsgg%203-deprivationcitizenshipfurthercommentfinal.pdf>>; Guy S Goodwin-Gill, *Deprivation of Citizenship, Statelessness, and International Law: More Authority (If It Were Needed...)* (5 May 2014) <<http://www.kaldorcentre.unsw.edu.au/sites/default/files/gsgg%204-deprivationcitizenship-moreauthority.pdf>>; Guy S Goodwin-Gill, *Deprivation of Citizenship Resulting in Statelessness and its Implications in International Law: Opinion* (12 March 2014) <<http://www.kaldorcentre.unsw.edu.au/sites/default/files/gsgg%202-deprivationcitizenshipintlawfinal.pdf>>. The British *Nationality Act 1981* (UK) c 61, s 40(4A), now contains an express exception to the general rule that an order to withdraw citizenship may not be made if the Secretary of State is satisfied that it would make a person stateless. The provision was inserted by the *Immigration Act 2014* (UK) c 22, s 66(1): see Michelle Foster and Hélène Lambert, ‘Statelessness as a Human Rights Issue: A Concept Whose Time Has Come’ (2016) 28 *International Journal of Refugee Law* 564, 581–2.

<sup>188</sup> Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 19 [2.41]–[2.42]. The report also canvasses similar legislation in New Zealand, the UK, the United States and France: at 19–21 [2.43]–[2.51].

<sup>189</sup> Shai Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel’ (2010) 13 *New Criminal Law Review* 404, 405.

<sup>190</sup> Patrick Wautelet, ‘Deprivation of Citizenship for “Jihadists”: Analysis of Belgian and French Practice and Policy in Light of the Principle of Equal Treatment’ (2016) *Social Science Research Network* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2713742](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713742)>.

<sup>191</sup> The term ‘foreign fighters’ is not included in the *Allegiance to Australia Act* itself, but denotes citizens who go abroad to fight with groups such as the Islamic State of Iraq and Syria in Syria.

<sup>192</sup> Sangeetha Pillai, ‘Proposals to Strip Citizenship Take Australia a Step Further than Most’ (2015) 2(13) *LSJ: Law Society of NSW Journal* 22.

French proposal<sup>193</sup> and the intended repeal of the Canadian provisions<sup>194</sup> — indicate that '[t]he trend is not linear'.<sup>195</sup>

The *Allegiance to Australia Act* introduced three new grounds on which a dual (or multiple) national may lose his or her citizenship.<sup>196</sup> First, a person aged 14 or above is deemed *automatically* to renounce his or her Australian citizenship '(including a person who became an Australian citizen [at] birth)',<sup>197</sup> if he or she 'acts inconsistently with their allegiance to Australia by engaging in'<sup>198</sup> terrorist activities, which include 'providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act',<sup>199</sup> 'financing terrorism',<sup>200</sup> and 'financing a terrorist'.<sup>201</sup> Such acts must have been carried out 'with the intention of advancing a political, religious or ideological cause' and of 'coercing, or influencing by intimidation' the government of any country, state or territory or 'intimidating the public or a section of the public'.<sup>202</sup> The Act provides that:

- (4) A person is taken to have engaged in conduct with [such] intention ... if, when the person engaged in the conduct, the person was:
- (a) a member of a declared terrorist organisation ... or
  - (b) acting on instruction of, or in cooperation with, a declared terrorist organisation. ...

<sup>193</sup> Kim Willsher, 'Hollande Drops Plan to Revoke Citizenship of Dual-National Terrorists', *The Guardian* (online), 30 March 2016 <<http://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists>>.

<sup>194</sup> Jocelyn Kane, *Change Is in the Air: Statelessness and Citizenship in Canada* (7 April 2016) European Network on Statelessness <<http://www.statelessness.eu/blog/change-air-statelessness-and-citizenship-canada>>:

The Government of Canada has moved to repeal specific aspects of the recent legislation with Bill C-6, *An Act to amend the Citizenship Act and to make consequential amendments to another Act*. Among other proposed changes to immigration entry and residency requirements, the government has moved to repeal the measures by which Canadian citizenship can be revoked, thereby removing tiered citizenship and the possibility of creating a new cohort of stateless persons in Canada.

<sup>195</sup> Foster and Lambert, above n 187, 581.

<sup>196</sup> *Allegiance to Australia Act* sch 1 items 3–5.

<sup>197</sup> *Citizenship Act* s 33AA(8).

<sup>198</sup> *Ibid* s 33AA(1).

<sup>199</sup> *Ibid* s 33AA(2)(c).

<sup>200</sup> *Ibid* s 33AA(2)(f).

<sup>201</sup> *Ibid* s 33AA(2)(g).

<sup>202</sup> *Ibid* s 33AA(3).

- (9) Where a person renounces their Australian citizenship under this section, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct ...<sup>203</sup>

In light of these deeming provisions, it is difficult to ascertain how any meaningful assessment of the potentially exculpatory (mens rea) factors listed above could be undertaken.

Second, '[a] person aged 14 or older' who 'is a national or citizen of [another] country' *automatically* ceases to be an Australian citizen not only where he or she 'serves in the armed forces of a country at war with Australia', but also where he or she 'fights for, or is in the service of, a declared terrorist organisation' (note that this fighting or service must occur outside Australia).<sup>204</sup> The Act is clear that '[t]he person ceases to be an Australian citizen at the time the person commences to so serve or fight',<sup>205</sup> and that this applies 'regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).'<sup>206</sup> However, a person is deemed not to be in the service of a declared terrorist organisation to the extent that '(a) the person's actions are unintentional; or (b) the person is acting under duress or force; or (c) the person is providing neutral and independent humanitarian assistance.'<sup>207</sup> However, given the lack of a clear procedure to make such determinations, discussed below, it is unclear how effective these potential defences could be in practice.

Third, the Minister may determine that a person ceases to be an Australian citizen if he or she has been convicted of a specified offence in contravention of named provisions of the *Criminal Code Act 1995* (Cth), *Crimes Act 1914* (Cth) and the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).<sup>208</sup> These include offences relating to international terrorist activities using explosive or lethal devices,<sup>209</sup> terrorism,<sup>210</sup> foreign incursions and recruitment,<sup>211</sup> treason (materially assisting enemies etc),<sup>212</sup> espionage

<sup>203</sup> Ibid ss 33AA(4), (9).

<sup>204</sup> Ibid s 35(1).

<sup>205</sup> Ibid s 35(2).

<sup>206</sup> Ibid s 35(3).

<sup>207</sup> Ibid s 35(4).

<sup>208</sup> Ibid s 35A(1)(a).

<sup>209</sup> *Criminal Code Act 1995* (Cth) sch 1 div 72 sub-div A.

<sup>210</sup> Ibid sch 1 pt 5.3.

<sup>211</sup> Ibid sch 1 pt 5.5.

and similar activities,<sup>213</sup> treachery<sup>214</sup> and sabotage.<sup>215</sup> The person must have been sentenced to a period of imprisonment of at least six years.<sup>216</sup> This provision can apply retrospectively where a person has been sentenced to ten or more years' imprisonment by a court.<sup>217</sup>

These provisions apply regardless of how a person became an Australian citizen, including by birth. In terms of age, they apply to children,<sup>218</sup> but only the third scenario requires consideration of 'the best interests of the child as a primary consideration' at the stage of revocation.<sup>219</sup> This is despite the fact that Australia has a duty under the *Convention on the Rights of the Child* to ensure that '[i]n all actions concerning children ... the best interests of the child shall be a primary consideration.'<sup>220</sup> The reason for the omission of this consideration in the constructive renunciation categories is practical: the renunciation takes effect 'immediately upon the person engaging in the [relevant] conduct',<sup>221</sup> or 'at the time the person commences to so serve or fight.'<sup>222</sup> In other words, it is automatically triggered by particular conduct. Any such consideration could therefore only occur at a later stage (if the Minister were to contemplate rescinding the revocation). However, that might never occur given that '[t]he Minister does not have a duty to consider whether to exercise the power' to rescind, even if requested to do so.<sup>223</sup>

Article 8(3) of the 1961 *Convention* provides that a state may deprive a person of nationality in circumstances relating to disloyalty, even where this would render the person stateless, but only if the state made a declaration to that effect at the time of accession to the treaty, which Australia did not do.

<sup>212</sup> Ibid sch 1 s 80.1AA.

<sup>213</sup> Ibid sch 1 s 91.1.

<sup>214</sup> *Crimes Act 1914* (Cth) s 24AA.

<sup>215</sup> Ibid s 24AB.

<sup>216</sup> *Citizenship Act* s 35A(1)(b).

<sup>217</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-Sixth Report of the 44<sup>th</sup> Parliament* (2016) 74–5 [2.249].

<sup>218</sup> In the automatic revocation case, they apply to children 14 or over: *Citizenship Act* ss 33AA(1), 35(1). The conviction provisions do not specify an age, but because they require conviction, the usual age of responsibility would presumably apply: at s 35A(1)(a). As the Parliamentary Joint Committee notes, the offences listed in s 35A 'apply to children aged over 10 years of age': ibid 77 [2.262].

<sup>219</sup> *Citizenship Act* s 35A(1)(e)(iv).

<sup>220</sup> *Convention on the Rights of the Child* art 3(1).

<sup>221</sup> *Citizenship Act* s 33AA(9).

<sup>222</sup> Ibid s 35(2).

<sup>223</sup> Ibid ss 33AA(15), 35(10).

Importantly, unlike comparable provisions in the UK that permit the denationalisation of naturalised British citizens even if that renders them stateless,<sup>224</sup> the Australian provisions do not apply to people who are Australian citizens *only*.<sup>225</sup> Hence, any revocation on such grounds can apply only to dual nationals.<sup>226</sup>

At first glance, the fact that these provisions apply only to dual nationals may suggest that they accord with Australia's obligations under the *1961 Convention*, and indeed academic commentary and parliamentary scrutiny to date appears to accept that this is so.<sup>227</sup> However, in our view, the amendments have the potential to render persons stateless because there are insufficient safeguards to ensure that a person is in fact a dual citizen before his or her citizenship is revoked.<sup>228</sup> These concerns are particularly pertinent to the first two categories, since conduct that falls within them gives rise to 'automatic' renunciation of citizenship, without the explicit need for any

<sup>224</sup> *British Nationality Act 1981* (UK) c 61, s 40, as amended by *Immigration Act 2014* (UK) c 22, s 66.

<sup>225</sup> *Citizenship Act* ss 33AA(1), 35(1)(a), 35A(1)(c). The *1961 Convention* only distinguishes between natural-born and naturalised citizens in relation to loss of nationality for long-term residence abroad: at art 7(4). During the drafting of the treaty, the UK representative, Mr Ross, stated that '[t]he natural-born person had a birthright to his nationality: but the naturalized person was expected to justify his acquisition of nationality by a higher standard of behaviour and States should have greater freedom to deprive him of his nationality', but not all delegates shared this view: UN Conference on the Elimination or Reduction of Future Statelessness, *Committee of the Whole — Summary Record of the Fifteenth Meeting*, GAOR, 15<sup>th</sup> mtg, Agenda Item 7, UN Doc A/CONF.9/C.1/SR.15 (24 April 1961) 10; cf at 3.

<sup>226</sup> This was acknowledged in Parliamentary Joint Committee on Intelligence and Security, above n 188, 49 [4.53], quoting Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 2.

<sup>227</sup> See, eg, Helen Irving and Rayner Thwaites, 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)' (2015) 26 *Public Law Review* 143, 148, referring to the Bill's 'respect' for 'the international law prohibition on citizenship revocation that gives rise to statelessness'. The most recent report of the Parliamentary Joint Committee on Human Rights, above n 217, 33 [2.28] states: 'The *Citizenship Act* applies only to Australian citizens holding dual citizenship, regardless of how the person became an Australian citizen. Accordingly, its provisions cannot operate to render a person stateless.'

<sup>228</sup> The proposed amendments potentially breach various human rights principles, such as the right to a fair trial and freedom of movement, and are potentially unconstitutional: see Shipra Chordia, Sangeetha Pillai and George Williams, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 16 July 2015; Centre for Comparative Constitutional Studies, Submission No 29 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 2015.

investigation into the applicant's citizenship status.<sup>229</sup> This is in contrast to other comparable regimes where compliance with the *1961 Convention* is understood to require specific consideration of the issue of statelessness. For example, in Canada, the relevant legislation explicitly provides that revocation provisions 'do not operate so as to authorize any decision, action or declaration that conflicts with any international human rights instrument regarding statelessness to which Canada is signatory',<sup>230</sup> and requires that the Minister must have 'reasonable grounds to believe the person is a citizen' of another country before pursuing revocation.<sup>231</sup> By contrast, the Australian amendments neither reference international law obligations pertaining to statelessness,<sup>232</sup> nor contain a comparable factual assessment as a condition precedent to revocation in every case.

In light of Australia's obligation not to 'deprive a person of its nationality if such deprivation would render him stateless',<sup>233</sup> the onus is on the Australian government to ensure that a person is indeed a dual national prior to any revocation of Australian citizenship. This requires the government to investigate with the 'competent authority' of the person's presumed other state of nationality as to whether the person is, in fact, a citizen.<sup>234</sup> This assessment involves an analysis not only of the legislation of the other state, 'but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.'<sup>235</sup> As this suggests:

Establishing whether an individual is ... a national under the operation of [the] law [of a foreign state] requires a careful analysis of how a State applies its na-

<sup>229</sup> Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), 7 [20].

<sup>230</sup> *Citizenship Act*, RSC 1985, c C-29, s 10.4(1).

<sup>231</sup> *Ibid* s 10.4(2).

<sup>232</sup> We are grateful to Anna Saunders, Juris Doctor student, Melbourne Law School, for this observation.

<sup>233</sup> *1961 Convention* art 8(1).

<sup>234</sup> UNHCR, *Handbook on Protection of Stateless Persons*, above n 10, 13 [27] (citations omitted):

Competence in this context relates to the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically. The competent authority or authorities will differ from State to State and in many cases there will be more than one competent authority involved.

<sup>235</sup> *Ibid* 12 [22] (citations omitted).



tionality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status.<sup>236</sup>

Such an assessment is particularly vital in the context of 'foreign fighters' where it is possible that, even if a person is a dual national, the other country of nationality may also invoke similar denationalisation provisions on the same grounds.<sup>237</sup>

A vivid illustration of the potential problems with deemed renunciation provisions and a failure to adequately assess whether a person in fact holds the nationality of another state is provided by the *Pham v Secretary of State for the Home Department* litigation in the UK.<sup>238</sup> In that case, the UK and Vietnam effectively engaged in a race to denationalize the applicant.<sup>239</sup> Mr Pham was born in Vietnam but lived in the UK from the age of six, during which time he acquired British nationality. Neither he nor his family ever held Vietnamese passports.<sup>240</sup> He converted to Islam at the age of 21 and, following suspected (but denied) terrorist training in Yemen, the UK Secretary of State served notice on Mr Pham of her decision to deprive him of his UK citizenship because to do so would be 'conducive to the public good'.<sup>241</sup> She considered that her order would not make him stateless because he would retain his Vietnamese citizenship.<sup>242</sup> Yet, although Mr Pham remained a Vietnamese citizen 'on the basis of the legislative texts alone',<sup>243</sup> the Vietnamese govern-

<sup>236</sup> Ibid 12 [23] (citations omitted). The *Handbook* continues at 13 [24]:

Applying this approach of examining an individual's position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to 'law' in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.

<sup>237</sup> This point was made in several submissions to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Bill: see, eg, Law Council of Australia, Submission No 26 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 17 July 2015, 26 [110]. For the final report, see Parliamentary Joint Committee on Intelligence and Security, above n 188.

<sup>238</sup> [2015] 1 WLR 1591.

<sup>239</sup> Ibid 1595–6 [3] (Lord Carnwath JSC for Lords Neuberger PSC, Wilson JSC, Carnwath JSC and Baroness Hale DPSC).

<sup>240</sup> Ibid 1595 [2].

<sup>241</sup> Ibid 1596 [3].

<sup>242</sup> Ibid 1595–6 [3].

<sup>243</sup> Ibid 1598 [14].

ment declined to accept him as a Vietnamese citizen in practice.<sup>244</sup> Notwithstanding this, his appeal to the UK Supreme Court was unsuccessful because the court adopted a very technical approach to assessing whether or not he was a Vietnamese national.<sup>245</sup>

Indeed, the need for an explicit assessment of dual nationality is acknowledged in other contexts in the *Citizenship Act*. For example, in the context of renunciation, s 33(7) of the *Citizenship Act* provides:

The Minister must not approve the person renouncing his or her Australian citizenship unless the Minister is satisfied that the person:

- (a) is a national or citizen of a foreign country immediately before the Minister's decision on the application; or
- (b) will, if the Minister approves the application, become a national or citizen of a foreign country immediately after the approval.<sup>246</sup>

Further, in the context of cessation of citizenship following conviction of an offence, new s 35A(1)(c) provides that '[t]he Minister may determine in writing that a person ceases to be an Australian citizen if', inter alia, 'the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination'. In addition, the Minister must be 'satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia',<sup>247</sup> and that, having regard to a list of factors, including most relevantly, 'the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person',<sup>248</sup> it is 'not in the public interest for the person to remain an Australian citizen'.<sup>249</sup>

However, with respect to ss 33AA(1) and 35(1)(b)(i) — the two new categories of constructive renunciation of citizenship — neither the legislation itself, nor anything in the background materials, provides guidance as to how the Australian government will verify that a person is a dual national. As Irving and Thwaites observe, 'the purported "automaticity" of these revocation mechanisms has been treated as making it unnecessary to provide for any

<sup>244</sup> Ibid 1595–6 [3].

<sup>245</sup> Ibid 1606 [38].

<sup>246</sup> See also *Citizenship Act* s 34(3)(b).

<sup>247</sup> Ibid s 35A(1)(d).

<sup>248</sup> Ibid s 35A(1)(e)(v).

<sup>249</sup> Ibid s 35A(1)(e).

decision-maker' since revocation 'just happens when the relevant conduct is undertaken.'<sup>250</sup> While the Minister is required to 'give, or make reasonable attempts to give, written notice' to the person that they have ceased to be an Australian citizen,<sup>251</sup> such 'reasonable attempts' may not be successful since these provisions apply where the conduct is engaged in outside Australia, or where 'the person left Australia after engaging in the conduct.'<sup>252</sup> In addition, the notice requirement does not apply in certain circumstances, such as 'if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations.'<sup>253</sup> Further, while s 35B of the *Citizenship Act* prescribes the '[m]atters [that must] be set out in notices to persons who have ceased to be Australian citizens,' these are limited to the relevant conduct by reason of which the recipient's citizenship has been renounced.<sup>254</sup> There is no requirement that the Minister make specific reference to having made a finding that the recipient has another nationality or citizenship, to identify the relevant other nationality, or to disclose that such a finding was required.

These concerns are compounded by the broader inadequacy of Australia's system for identifying and protecting stateless persons, discussed in the companion article.<sup>255</sup> Despite Australia's pledge in 2011 'to better identify stateless persons and assess their claims',<sup>256</sup> there is still no legislative basis for determining statelessness, and our analysis of the relevant procedures advice manual, tribunal and judicial decisions reveals a lack of consistency and clarity concerning the methods for ascertaining whether a person is indeed a citizen of another state. Not only is there no coordinated approach to collecting information about stateless persons in Australia, but the Department of Immigration and Border Protection has explicitly stated that it cannot estimate the precise number of dual citizens, acknowledging 'that the figure was "not captured in the census because it is not a matter directly within the

<sup>250</sup> Irving and Thwaites, above n 227, 144 (emphasis in original).

<sup>251</sup> *Citizenship Act* s 33AA(10).

<sup>252</sup> *Ibid* s 33AA(7). Section s 35(1)(c) concerns overseas service.

<sup>253</sup> *Ibid* s 33AA(12).

<sup>254</sup> *Ibid* ss 35B(1)–(2). However, we note that the Minister can decline to provide information for various reasons, including that 'the disclosure of the information or content would be likely to be contrary to the public interest for any other reason': at s 35B(3)(d).

<sup>255</sup> Foster, McAdam and Wadley, above n 6.

<sup>256</sup> See UNHCR, *Pledges 2011*, above n 63, 49.

competence of any agency or department”<sup>257</sup> It is questionable in these circumstances whether an internal, unaccountable and unreviewable process can accurately and appropriately allow for the analysis required to ensure that the renunciation provisions do not render a person stateless.

Although the Minister may make a determination to rescind a renunciation of citizenship notice, and thus exempt a person from the effect of his or her conduct, the Minister is not required to consider: (a) whether to exercise this discretion at all, or (b) any particular matters in deciding whether to consider exercising the discretion.<sup>258</sup> Further, the Act explicitly provides that there is no requirement on the Minister to provide notice or reasons for deciding not to consider exercising the discretion,<sup>259</sup> and that the rules of natural justice do not apply to, inter alia, ‘any decision whether to consider exercising the power’ to exercise the discretion.<sup>260</sup> It is only once the Minister has decided to consider whether to exercise the discretion that he or she ‘must have regard to’ a series of factors that include ‘the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person.’<sup>261</sup> However, even in this context there is no requirement to consider whether the person is indeed a national or citizen of another country.

The only safeguard lies in ss 33AA(24) and 35(19), which provide that ‘a person’s citizenship is taken never to have ceased under’ the operative sections (in relation to specified conduct) if, inter alia, ‘in proceedings under section 75 of the *Constitution*, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time’ of the conduct.<sup>262</sup> However, this protection is unlikely to be effective. Even if the Minister’s ‘reasonable attempts’ to provide the relevant notice of revocation are successful, a person to whom these provisions apply is, by definition, likely to be outside Australia; the resources

<sup>257</sup> Parliamentary Joint Committee on Intelligence and Security, above n 188, 38 [4.15] quoting Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 5 August 2015, 57 (Michael Pezzullo, Secretary, Department of Immigration and Border Protection).

<sup>258</sup> *Citizenship Act* ss 33AA (15)–(16).

<sup>259</sup> *Ibid* s 33AA(21).

<sup>260</sup> *Ibid* s 33AA(22). All of these provisions are replicated in s 35.

<sup>261</sup> *Ibid* ss 33AA(17)(f), 35(12)(f).

<sup>262</sup> *Ibid* ss 33AA(24)(b), 35(19)(b).

required to mount judicial proceedings are considerable; and judicial review (as opposed to merits review) is constrained.<sup>263</sup>

It has recently been reported that a Citizenship Loss Board has been created within the executive to assist the Minister to assess cases of revocation pursuant to the *Allegiance to Australia Act*.<sup>264</sup> However, the Board is not established, constituted or regulated by statute. As George Williams has observed, neither the membership of the Board nor its proposed procedure has been published, and it appears that the procedure will be a closed one that will not accord procedural fairness to applicants.<sup>265</sup> There is an interesting question whether the High Court's decision in *Plaintiff M61/2010E v Commonwealth*<sup>266</sup> would dictate that the rules of procedural fairness need apply to the Citizenship Loss Board, given that that case also involved a so-called non-statutory decision-making body established in order to assist the Minister to decide whether or not to exercise a discretion.<sup>267</sup> The

<sup>263</sup> The Parliamentary Joint Committee on Human Rights has noted that the procedural rights concerning a fair hearing are seriously compromised by the constructive renunciation provisions described above: Parliamentary Joint Committee on Human Rights, above n 217, 59–67 [2.161]–[2.210]. In terms of judicial review pursuant to s 75 of the *Australian Constitution*, the Committee explained that ‘judicial review is not sufficient to fulfil the international standard required of “effective review”, where it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision’: at 62 [2.177]. This issue was also the subject of many submissions to the Parliamentary Joint Committee on Intelligence and Security’s inquiry: see Parliamentary Joint Committee on Intelligence and Security, above n 188, 55–6 [4.77], 147 [7.76], 149 [7.85]–[7.86].

<sup>264</sup> Santilla Chingaipe, ‘What is the Citizenship Loss Board and How Will It Work?’, *SBS News* (online), 14 April 2016 <<http://www.sbs.com.au/news/article/2016/04/14/what-citizenship-loss-board-and-how-will-it-work>>.

<sup>265</sup> George Williams, ‘Stripping of Citizenship a Loss in More Ways than One’, *The Age* (online), 17 April 2016 <<http://www.theage.com.au/comment/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html>>. We note that a freedom of information request by *The Guardian* newspaper elicited the minutes of the Citizenship Loss Board’s meeting on 23 February 2016, revealing that the Board is chaired by the Department of Immigration and Border Protection and composed of legal representatives from a range of government departments and agencies: Citizenship Loss Board, *Draft Minutes of Meeting* (Department of Immigration and Border Protection (Cth), Canberra, 23 February 2016). See also Paul Farrell, ‘Government Officials of Secretive Citizenship Loss Board Named’, *The Guardian* (online), 22 July 2016 <<https://www.theguardian.com/australia-news/2016/jul/22/government-members-of-secretive-citizenship-loss-board-named>>.

<sup>266</sup> (2010) 243 CLR 319.

<sup>267</sup> *Ibid* 336 [15], 343 [41]–[43]. However, we note that the minutes of the first meeting of the Citizenship Loss Board suggest that ‘the Board is a inter-departmental committee providing advice, not a decision-making body’: Citizenship Loss Board, *Draft Minutes of Meeting* (Department of Immigration and Border Protection (Cth), Canberra, 23 February 2016), Agen-

difficulty, however, again lies in a person subject to such an assessment being able to effectively exercise a right to judicial review, given they will likely be outside the country and potentially unaware of the revocation (if, for example, the Minister's 'reasonable attempts' to provide the relevant notice fail).

This reliance on a closed, opaque, internal administrative procedure rather than a judicial determination is at odds with the procedural safeguards adopted in many comparable jurisdictions. For example, in Belgium,<sup>268</sup> Israel<sup>269</sup> and the United States,<sup>270</sup> denationalisation connected to disloyalty and terrorism can only result from a decision of a court. In Canada, the Minister has discretion solely in relation to deprivation following a conviction, but must seek a declaration from the Federal Court of Canada where revocation is based on foreign service.<sup>271</sup> The UK appears to countenance very broad ministerial discretion, but as Pillai observes, such broad powers 'have attracted substantial criticism.'<sup>272</sup> As she notes, 'while a person may lodge an appeal against a citizenship deprivation order, this does not prevent them from being deported from the UK. This can make it very difficult to initiate appeal proceedings.'<sup>273</sup> These concerns are a fortiori in Australia where a person may have their citizenship revoked while they are overseas.

In sum, we have serious concerns that the recent amendments to Australia's *Citizenship Act* fail to provide adequate safeguards to ensure compliance with Australia's obligations under art 8 of the *1961 Convention*: namely, to ensure that Australia 'shall not deprive a person of its nationality if such deprivation would render him stateless.'<sup>274</sup>

While it is beyond the scope of this article to assess in-depth the numerous additional international law obligations invoked by a state's decision to denationalise its citizens, it is important to note that there is a range of other human rights considerations that may be implicated in such practices. The many relevant human rights treaties to which Australia is a party have been examined comprehensively by the Australian Parliamentary Joint Committee

da Item 2. Nonetheless, the findings of the Board may be very influential in the exercise of ministerial discretion.

<sup>268</sup> Wautelet, above n 190, [2.3].

<sup>269</sup> Lavi, above n 189, 422.

<sup>270</sup> Parliamentary Joint Committee on Intelligence and Security, above n 188, 20 [2.48]–[2.49].

<sup>271</sup> *Ibid* 19 [2.41].

<sup>272</sup> Pillai, 'Proposals to Strip Citizenship Take Australia a Step Further Than Most', above n 192, 23.

<sup>273</sup> *Ibid*.

<sup>274</sup> *1961 Convention* art 8(1).

on Human Rights.<sup>275</sup> As Matthew J Gibney has so eloquently articulated, '[t]he loss of citizenship transforms the citizen into an alien in the eyes of the state, stripping them of all rights held qua citizen and making them vulnerable to deportation power.'<sup>276</sup> Given that citizenship is often a precursor to the enjoyment of many other rights, it is not surprising that the catalogue of rights potentially affected is wide, spanning both civil and political, as well as social and economic, rights.<sup>277</sup>

At the core of concerns relating to denationalisation powers is a deeply ethical one. Gibney explains that many political theorists have explored the notion that, regardless of legal entitlement, 'continued residence over time in a state gives rise to a moral right to residence and thus to membership',<sup>278</sup> on the basis that it is 'unjust not to grant people citizenship in countries where they have made their lives.'<sup>279</sup> The notion of a right to citizenship *jus domicilii* is only in nascent form in international law,<sup>280</sup> yet international human rights law recognises that persons other than citizens may have a right to live in the country in which they have established their life. Specifically, the right to return to one's 'own country' is enshrined in art 12(4) of the *ICCPR*. This has particular pertinence to Australia given that the provisions effecting constructive renunciation can apply when a person is overseas, which has the effect of denationalising for the purposes of preventing return.<sup>281</sup> Yet, art 12(4) is not subject to any limitation, even on national interest or security grounds.<sup>282</sup> As the UN Human Rights Committee has unequivocally stated:

<sup>275</sup> Parliamentary Joint Committee on Human Rights, above n 217, 35–58 [2.38]–[2.153].

<sup>276</sup> Matthew J Gibney, "'Very Transcendental Power': Denaturalisation and the Liberalisation of Citizenship in the United Kingdom' (2013) 61 *Political Studies* 637, 638.

<sup>277</sup> See Parliamentary Joint Committee on Human Rights, above n 217, 35–6 [2.38]–[2.39].

<sup>278</sup> Matthew J Gibney, 'Should Citizenship be Conditional? The Ethics of Denationalization' (2013) 75 *Journal of Politics* 646, 655.

<sup>279</sup> *Ibid.*

<sup>280</sup> One rare provision that does incorporate the residency principle is found in the *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000) art 6.

<sup>281</sup> This is supported by the background material. The Parliamentary Joint Committee on Human Rights, above n 217, 46 [2.80] provides that '[t]he committee considered that it was clear from the statement of compatibility to the original bill that the intention was to exclude Australian citizens who are outside Australia at the time their citizenship ceases, from being able to return to Australia.'

<sup>282</sup> *ICCPR* art 12(3) allows for limits only to arts 12(1)–(2), not 12(4): see *ibid* 45–7 [2.75]–[2.86].

The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them ... *A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.*<sup>283</sup>

The right to return to one's own country applies regardless of whether a person has another nationality.<sup>284</sup> Indeed, in practice, the second nationality may be ineffective<sup>285</sup> or even unknown to a person,<sup>286</sup> or even at risk itself as a result of the application of citizenship-stripping laws in that jurisdiction.<sup>287</sup> It may be that a person has never visited, let alone lived in, the other country. For instance, in *Nystrom v Australia*, the UN Human Rights Committee found that notwithstanding Nystrom's possession of Swedish nationality, the Australian government breached art 12(4) by deporting him to Sweden 'in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden.'<sup>288</sup>

There are also consequences in international law beyond the human rights context, particularly with regard to relationships with other states. Since 'the consequences of the act of rendering an individual stateless are very likely to

<sup>283</sup> Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [20]–[21] (emphasis added). See also Human Rights Committee, *Views: Communication No 1557/2007*, 102<sup>nd</sup> sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) ('*Nystrom v Australia*').

<sup>284</sup> See, eg, *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

<sup>285</sup> As observed by the Refugee Council of Australia in its evidence to the Parliamentary Joint Committee on Intelligence and Security, there is a risk of persons becoming 'de facto stateless if they do not enjoy effective citizenship in their other countries of nationality': Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 5 August 2015, 20 (Lucy Morgan, Refugee Council of Australia).

<sup>286</sup> Parliamentary Joint Committee on Intelligence and Security, above n 188, 38 [4.13]–[4.16].

<sup>287</sup> Audrey Macklin, 'Kick-Off Contribution' in Audrey Macklin and Rainer Bauböck (eds), 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (Working Paper No RSCAS 2015/14, European University Institute, February 2015) 1, 5–6.

<sup>288</sup> *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.5].



have an impact on the rights of other States,<sup>289</sup> any analysis of the legality of depriving an individual of nationality must go beyond the provisions of the *1961 Convention* alone. For instance, the implications of deprivation of nationality resulting in statelessness may undermine states' obligations under certain treaties relating to 'terrorist acts'<sup>290</sup> (eg, with respect to 'the obligations of investigation and prosecution, in the fulfilment of which every other State party has a legal interest'),<sup>291</sup> and may also violate the rights of other states. Such violations may arise 'in a number of contexts, including deportation, refusal of re-admission, human rights, the obligations of the [state] with regard to the prosecution of international crimes, and applications for protection abroad.'<sup>292</sup>

The general position in international law is captured succinctly by Goodwin-Gill. He explains that a state 'has no right ... to deport a person whom it has made stateless to any State which has not expressly agreed to admit the individual, or 'to refuse to readmit a former ... citizen who has been deprived of his or her citizenship while present in another country.'<sup>293</sup> A state that seeks to export citizens believed to have committed 'terrorist acts' will likely violate its obligations relating to the prevention and prosecution of international criminal conduct,<sup>294</sup> and a state that has admitted someone 'on the basis of [their] passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person.'<sup>295</sup> Goodwin-Gill suggests that it is not inconceivable that a person deprived of nationality in such circumstances could qualify for refugee status.<sup>296</sup> The *Allegiance to*

<sup>289</sup> Goodwin-Gill, *Further Comments*, above n 187, 5 [19]. See also Goodwin-Gill, *More Authority*, above n 187, 8–9 [18]–[21]; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9<sup>th</sup> ed, 1992) vol 1, 877–80; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) 386; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8<sup>th</sup> ed, 2012) 519–20.

<sup>290</sup> *International Convention against the Taking of Hostages*, opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256 (entered into force 23 May 2001); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002). See also Goodwin-Gill, *Opinion*, above n 187, 13–16 [29]–[36].

<sup>291</sup> Goodwin-Gill, *Opinion*, above n 187, 1.

<sup>292</sup> *Ibid* 9 [16].

<sup>293</sup> *Ibid* 1.

<sup>294</sup> *Ibid* 19 [47].

<sup>295</sup> *Ibid* 12 [24]. For more detail, see Goodwin-Gill, *More Authority*, above n 187.

<sup>296</sup> Goodwin-Gill, *Opinion*, above n 187, 17–19 [42]–[45].

*Australia Act* amendments are largely silent as to these implications, although in relation to revocation following criminal conviction, the Minister is required to consider, inter alia, 'Australia's international relations'.<sup>297</sup>

It is unlawful for a state to deprive a citizen of nationality 'for the sole purpose of expelling him or her'.<sup>298</sup> To do so 'would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the *Universal Declaration of Human Rights*' (namely, that '[n]o one shall be arbitrarily deprived of his nationality'),<sup>299</sup> and would trample upon the goodwill of other states. Paul Weis explained this as '[a] sort of estoppel on the part of the State of nationality',<sup>300</sup> observing that:

The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished.<sup>301</sup>

It 'would be contrary to international law not only as an abuse of right but as a direct infringement of the sovereign rights of the State of residence, ie of the right to expel aliens, which follows from its territorial supremacy'.<sup>302</sup> Yet, 'banishment' appears to be a core motivation for the Australian amendments.<sup>303</sup>

In sum, there are compelling reasons for concern that the *Allegiance to Australia Act* does not contain sufficient safeguards to ensure compliance with Australia's obligations under the *1961 Convention*. In addition, it risks violating a range of other international law obligations, including under human rights law.

<sup>297</sup> *Citizenship Act* s 35A(1)(e)(vi).

<sup>298</sup> Article 9 of the Draft Articles on the Expulsion of Aliens is reproduced in the *Report of the International Law Commission: Sixty-Fourth Session*, UN GAOR, 67<sup>th</sup> sess, Supp No 10, UN Doc A/67/10 (2012) 13 ('Report of the International Law Commission').

<sup>299</sup> *Report of the International Law Commission*, UN Doc A/67/10, 32.

<sup>300</sup> Weis, *Nationality and Statelessness in International Law*, above n 15, 55 n 146.

<sup>301</sup> *Ibid* 55 (citations omitted).

<sup>302</sup> *Ibid* 57.

<sup>303</sup> The then Prime Minister Tony Abbott described the revocation provisions as effecting banishment: Tony Abbott, '2015 Magna Carta Lecture' (Speech delivered at Parliament House, Canberra, 24 June 2015), cited in Irving and Thwaites, above n 227, 148.

## VI CONCLUSION

In this article, we have undertaken a detailed examination of Australia's compliance with the *1961 Convention*. As we have established, despite relatively early ratification and a recently renewed commitment by Australia to 'minimis[e] the incidence of statelessness',<sup>304</sup> Australian law fails to fully implement its international obligations both in terms of laws determining acquisition and those permitting deprivation of citizenship. Our analysis focused on laws relating to the deliberate deprivation and constructive renunciation of citizenship, as well as more latent barriers to nationality, such as birth registration. A major finding is that despite apparent assumptions to the contrary, recent amendments to the *Citizenship Act* have in fact created new risks of statelessness. Just as is the case in relation to the identification and protection of stateless persons pursuant to the *1954 Convention*, Australia remains a long way from giving effect to the pledge it made six years ago to minimise the occurrence of statelessness and to improve the lives of stateless persons in Australia. The predicament of stateless persons in Australia has historically been overlooked and under-researched. It is hoped that the research presented in this article, together with its companion piece, may contribute to a greater awareness and interest in this important issue.

<sup>304</sup> UNHCR, *Pledges 2011*, above n 63, 49.