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**PART ONE: THE PROTECTION OF STATELESS
PERSONS IN AUSTRALIAN LAW — THE
RATIONALE FOR A STATELESSNESS
DETERMINATION PROCEDURE**

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Over the past decade, there has been renewed global interest in statelessness. With the 50th anniversary of the 1961 Convention on the Reduction of Statelessness in 2011 (coinciding with the 60th anniversary of the 1951 Convention Relating to the Status of Refugees), the UNHCR organised a Ministerial Intergovernmental Event on Refugees and Stateless Persons which stimulated unprecedented commitments by states to adopt and implement actions to address statelessness. There were further important developments in 2014. That year marked the 60th anniversary of the 1954 Convention Relating to the Status of Stateless Persons, the launch of the UNHCR's 10-year campaign to eradicate statelessness, and the first Global Forum on Statelessness, co-hosted by the UNHCR and Tilburg University. However, to date there has been virtually no legal or academic analysis of statelessness in Australia, and little in the way of government

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responses to it. This article, together with a companion article published separately in this issue, provides the first comprehensive analysis of the state of statelessness in Australian law. It examines Australia's compliance with its obligations under international law to identify and protect stateless persons, and makes recommendations for future legislative reform, including the creation of a statelessness status determination procedure.

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I INTRODUCTION

The problem of statelessness is not only a legal problem resulting in the inability to exercise rights. It is a problem of identity under the law.¹

The protection of stateless persons has long been a focus of concern of the international community. From the 1920s until the end of the Second World War, the plight of all those displaced — whether refugees or stateless persons — was understood in terms of a shared predicament, namely being outside their country of origin or former habitual residence, and lacking protection.² In the aftermath of the Second World War, the legal status of ‘persons who do not enjoy the protection of any government’ was given early consideration,³ and it was recognised that action was needed ‘to ensure that everyone shall have an effective right to a nationality’.⁴ The resultant report, *A Study of Statelessness*,⁵ noted the importance of both improving the protection of stateless persons, and eliminating statelessness in the future. This required the creation of a legal status for stateless persons, as well as efforts to improve domestic nationality laws, facilitate naturalisation and better regulate territorial settlements.

As a result, the United Nations (‘UN’) established the Ad Hoc Committee on Statelessness and Related Problems whose mandate was to consider the desirability of a ‘revised and consolidated convention relating to the international status of refugees and stateless persons’, and ways to eliminate future statelessness.⁶ The Committee almost immediately separated out the question of the resolution of the status of refugees, on the one hand, and stateless

¹ Carol A Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10 *International Journal of Refugee Law* 156, 181–2.

² See, eg, Guy S Goodwin Gill, ‘The Rights of Refugees and Stateless Persons’ in K P Saksena (ed), *Human Rights: Perspectives and Challenges (in 1900’s and Beyond)* (Lancers Books, 1994) 378, 389–90; Guy S Goodwin-Gill, *Introductory Note: Convention Relating to the Status of Stateless Persons* (2017) United Nations Audiovisual Library of International Law <<http://legal.un.org/avl/ha/cssp/cssp.html>>. For a thorough overview of the history of the interrelationship between the protection of refugees and stateless persons at international law see Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press, forthcoming).

³ United Nations Commission on Human Rights, *Report of the Commission on Human Rights: Second Session*, UN ESCOR, 2nd sess, UN Doc E/600 (17 December 1947) 16 [46].

⁴ ESC Res 116 (VI) (D), UN ESCOR, 6th sess, UN Doc E/777 (12 March 1948, adopted 1–2 March 1948) 18.

⁵ *A Study of Statelessness*, UN Docs E/1112, E/1112/Add.1 (August 1949).

⁶ ESC Res 248 (IX) (B), UN ESCOR, 9th sess, Supp No 1, UN Doc E/1553/Corr.1 (8 December 1949, adopted 8 August 1949) 60.

persons, on the other, with the refugee challenge accorded priority.⁷ While some stateless persons were also refugees, others were not, and notwithstanding differences of opinion among delegates, the majority felt that the needs of refugees were so pressing that they should be dealt with first.⁸

This approach resulted in the relegation of the two statelessness Conventions, adopted in 1954 and 1961, to relative obscurity for decades. However, the identification, recognition and legal protection of stateless persons has undergone a renaissance in the past decade, chiefly led by the work of the UN High Commissioner for Refugees ('UNHCR'),⁹ and supported by a flourishing emerging body of academic research on the plight of stateless persons internationally.¹⁰ As two leading thinkers in this area recently concluded, 'statelessness has now "arrived" as a recognised focus of both academic and policy-oriented study.'¹¹

Yet, notwithstanding Australia's active role in the formulation of the relevant international legal treaties, and its early ratification of them,¹² there is virtually no academic analysis or research on the extent, predicament or protection of stateless persons in Australia.¹³ Further, despite a pledge in 2011

⁷ See James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 64–5.

⁸ See the analysis in Goodwin-Gill, *Introductory Note: Convention Relating to the Status of Stateless Persons*, above n 2.

⁹ We acknowledge that the UN High Commissioner for Refugees has not always had responsibility for de jure stateless persons. Unlike the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), the *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) does not repose supervisory authority in the UN High Commissioner for Refugees. However, in 1995 it was given such responsibility via a General Assembly resolution: see generally Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 88.

¹⁰ See Laura van Waas, "'Are We There Yet?' The Emergence of Statelessness on the International Human Rights Agenda' (2014) 32 *Netherlands Quarterly of Human Rights* 342, who notes that '[w]hile even a decade ago it was not easy to find much in the way of resources or analysis on statelessness, research projects and academic writing on statelessness has mushroomed': at 345.

¹¹ Mark Manly and Laura van Waas, 'The State of Statelessness Research: A Human Rights Imperative' (2014) 19 *Tilburg Law Review* 3, 3.

¹² See below Part III.

¹³ A thorough literature search revealed only three publications. Christopher Richter's article from 2005 focuses very much on the potential for a complementary protection regime to protect stateless persons: Christopher Richter, 'Statelessness in Australian Refugee Law: The (Renewed) Case for Complementary Protection' (2005) 24 *University of Queensland Law Journal* 545. The other two publications are Susan Kennedy, 'Statelessness Matters 10 Years

by the Australian government to the UNHCR that it would ‘better identify stateless persons and assess their claims’ and ensure that ‘stateless persons are treated no less favourably than people with an identified nationality’,¹⁴ key treaty obligations have yet to be implemented in domestic law. While individual cases have sometimes highlighted the plight of stateless persons in Australia, such as the infamous case of Mr Al-Kateb,¹⁵ and the more recent plight of ‘baby Ferouz’,¹⁶ there remains a significant lacuna in understanding and analysis of the issue.

In this article, we present the first comprehensive analysis of the state of statelessness in Australian law and the reasons why the creation of a statelessness status determination procedure is essential to ensure that Australia complies with its international legal obligations. We begin by briefly outlining the meaning of statelessness and its consequences for those without protection in Part II, before turning to an overview of Australia’s relevant international obligations in Part III. In Part IV we outline what is currently known about the number of stateless persons in Australia. In Part V we turn to consider the protection of stateless persons in Australian law in light of obligations under both the 1951 *Convention Relating to the Status of Refugees*

on from *Al-Kateb: Statelessness in the Australian Context*, (2014) 1(1) *IAFOR Journal of Politics, Economics and Law* <<http://iafor.org/archives/journals/journal-of-politics/Statelessness-matters.pdf>>, which considers ‘how concepts about stateless communities might develop within the Refugee and Migration Review Tribunals’; Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (2010) 110–39 <<http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>>, which discusses the detention of stateless persons in Australia. For an interesting account of statelessness as a ‘forgotten human rights crisis’, see generally Lindsey N Kingston, ‘“A Forgotten Human Rights Crisis”: Statelessness and Issue (Non)Emergence’ (2013) 14 *Human Rights Review* 73.

¹⁴ UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)* (2012) 49. The government also foreshadowed such a procedure when it introduced the Migration Amendment (Complementary Protection) Bill 2009 (Cth) into Parliament, and in late 2010 when it released an issues paper affirming the need for such a procedure: see Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8991–2 (Laurie Ferguson); Onshore Protection Consultative Group, ‘Statelessness’ (10 November 2010); Onshore Protection Consultative Group, ‘Statelessness: Extract of Issues Paper’ (4 November 2010).

¹⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562.

¹⁶ *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>.

(‘*Refugee Convention*’)¹⁷ and the 1954 *Convention on the Status of Stateless Persons* (‘*1954 Convention*’),¹⁸ the twin international regimes dedicated to the identification of those in need of international protection.¹⁹ In Part VI we make a case for the establishment of a dedicated statelessness status determination procedure in Australia, and make recommendations as to the key features of such a procedure.

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

Article 1(1) of the *1954 Convention* establishes the universal definition of a ‘stateless person’ as ‘a person who is not considered as a national by any State under the operation of its law.’²⁰ This is a deliberately narrow, technical definition that ‘is not one of quality, simply one of fact.’²¹ It does not take into account whether nationality is *effective*, but only whether a person has it, as a matter of law. Nor is the definition concerned with the reasons for the individual’s lack of nationality; the absence of nationality in and of itself is sufficient to ground an entitlement to protection.²² Nationality refers to the

¹⁷ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

¹⁸ *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

¹⁹ States also have international protection obligations under human rights treaties, such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). However, as their full titles indicate, the *Refugee Convention* and the *1954 Convention* are the two international treaties to set out a specific legal status for their beneficiaries.

²⁰ The *1954 Convention* also sets out the basic principles underpinning the application of the treaty (arts 2–11), and sets out the rights and entitlements of stateless persons (arts 12–32). Although it currently has only 89 states parties, the UNHCR argues that it also codifies the customary international law definition, citing the International Law Commission: see UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014) 9 [13]. For analysis of the definition, see at 9–23 [13]–[56].

²¹ Carol A Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7 *International Journal of Refugee Law* 232, 232.

²² As observed by Laura van Waas, ‘The UN Statelessness Conventions’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 64, 72.

'legal bond between a person and a State',²³ and for the purposes of this article, we use the terms nationality and citizenship interchangeably.²⁴

While states have a duty not to create statelessness,²⁵ they do not have a corresponding obligation to *confer* nationality, other than in specific situations such as the requirement of the 1961 *Convention on the Reduction of Statelessness* ('1961 Convention')²⁶ that nationality be granted to a child born on a state's territory where a child would otherwise be stateless.²⁷ Article 15(1) of the *Universal Declaration of Human Rights* provides that '[e]veryone has the right to a nationality',²⁸ but this was not translated into binding form in the *International Covenant on Civil and Political Rights* ('ICCPR'), other than for children.²⁹ Although art 12(4) of the ICCPR provides that '[n]o one shall be

²³ 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, 52 n 1. See also the International Court of Justice in *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 23: 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties'.

²⁴ While this is a very common practice, Weis explains that they in fact emphasise 'two different aspects of the same notion: State membership. "Nationality" stresses the international, "citizenship" the national, municipal, aspect': P Weis, *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff, 2nd ed, 1979) 4–5.

²⁵ See Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', above n 1, 169; 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) 6 ('Refugee Status').

²⁶ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

²⁷ *Ibid* art 1. See generally Johannes M M Chan, 'The Right to a Nationality as a Human Right: The Current Trend towards Recognition' (1991) 12 *Human Rights Law Journal* 1, 10–11.

²⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 15(1).

²⁹ ICCPR art 24(3) provides that '[e]very 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, 3rd 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; 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) ('Guidelines on Statelessness No 4').

arbitrarily deprived of the right to enter his own country',³⁰ it does not impose positive obligations per se to confer nationality on any particular individual. Hence, while the traditional position that nationality is within the reserved domain of states has undoubtedly been tempered by international human rights norms, considered below, states nonetheless retain significant discretion to design their citizenship laws in line with their own internal sociopolitical interests. In other words, the principle set out in art 1 of the 1930 Hague *Convention on Certain Questions Relating to the Conflict of Nationality Laws* that '[i]t is for each State to determine under its own law who are its nationals',³¹ remains the default position in international law today.

Nationality is important because it 'serves as the basis for legal recognition and for exercise of other rights'.³² Yet, the UNHCR estimates that at least 10 million people worldwide are stateless,³³ with the highest known concentration in the Asia-Pacific region.³⁴ It is difficult to provide a precise number of stateless persons globally on account of the difficulties inherent in counting stateless populations,³⁵ inaccurate reporting and inconsistent definitions of statelessness.³⁶ What is known, however, is that some families have been stateless for generations, and that despite renewed attention to this issue and positive actions by many states to prevent or reduce statelessness, new cases continue to arise.³⁷

The causes of statelessness are multifaceted and varied. Statelessness can occur as a result of discriminatory or conflicting nationality laws,³⁸ arbitrary deprivation of nationality, the dissolution, separation or succession of states,

³⁰ To not be arbitrary, such deprivation must conform with domestic law and comply with both 'procedural and substantive standards of international human rights law': *Refugee Status*, UN Doc PPLA/2014/01, 9.

³¹ *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).

³² Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', above n 1, 168.

³³ UNHCR, *Ending Statelessness* (2017) <<http://www.unhcr.org/pages/49c3646c155.html>>; UNHCR, *Global Trends: Forced Displacement in 2015* (2016) 2.

³⁴ 'Annex' (2014) 14 *UNHCR Statistical Yearbook* 79, 83. This shows that the Asia-Pacific accounts for about 1.5 million of the 3.5 million stateless persons accounted for in government data submitted to the UNHCR. The 10 million figure is a broad overall estimate, whereas the 3.5 million figure reflects what has been reported in data submitted to UNHCR.

³⁵ UNHCR, *Global Action Plan to End Statelessness 2014–24* (2014) 24.

³⁶ UNHCR, 'UNHCR Launches Campaign to Combat Statelessness' (Press Release, 25 August 2011) <<http://www.unhcr.org/4e54e8e06.html>>.

³⁷ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 1

³⁸ UNHCR, 'Gender Equality, Nationality Laws and Statelessness 2014' (Background Note, UNHCR, 7 March 2014) <<http://www.unhcr.org/4f5886306.html>>.

entrenched barriers to birth registration and other civil registration processes, administrative oversights, the renunciation of one nationality without first acquiring another citizenship, or denationalisation.³⁹ A person can also be rendered stateless through marriage or the ‘dissolution of a marriage between couples from different countries’, or by being born to a stateless person.⁴⁰ Migration can also result in statelessness (or a risk of statelessness) for refugees and irregular migrants without documents who lose their ties or proof of nationality in relation to their country of nationality, and are unable to acquire the nationality of their host state.⁴¹

While the causes of statelessness vary widely, the consequences are often very similar for those affected by this phenomenon. In Hannah Arendt’s words, they are denied ‘a right to have rights’.⁴² Stateless persons (and those at risk of becoming stateless) often live in a ‘legal limbo’⁴³ characterised by vulnerability, insecurity and marginalisation.⁴⁴ They often have (at best) limited access to basic human rights such as education, regularised employment, housing and health services.⁴⁵ They typically face a heightened risk of exploitation, arrest and arbitrary detention because they cannot prove who

³⁹ See generally Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia, 2008); *Refugee Status*, UN Doc PPLA/2014/01, 6, 14; Weis, above n 24, 115–34; UNHCR, ‘Gender Equality Background Note’, above n 38. On denationalisation 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.

⁴⁰ UNHCR, *Self-Study Module on Statelessness* (2012) 19.

⁴¹ *Ibid* 26–7.

⁴² Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace and Company, 1951) 294. See also Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012).

⁴³ Harry J Kits, ‘Betwixt and between: Refugees and Stateless Persons in Limbo’ (2005) 22(2) *Refugee* 3, 5.

⁴⁴ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 1. The important work of Lynch and Blitz has highlighted that many stateless persons effectively ‘struggle to exist’: 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. However, 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 Nicholas Oakeshott for this insight.

⁴⁵ See 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; Marilyn Achiron and Radha Govil, *Nationality and Statelessness: Handbook for Parliamentarians No 22* (Inter-Parliamentary Union/UNHCR, 2nd ed, 2014) 3.

they are or that they have links to any country.⁴⁶ Without a nationality, a person may be unable to buy and sell property, open a bank account, pay taxes, legally marry or register the birth of a child.⁴⁷ The predicament of stateless children has garnered particular international attention in recent years.⁴⁸ The UNHCR estimates that there is ‘a stateless child being born ... at least every 10 minutes’, and observes that the effects of being born stateless are profound especially in terms of access to the most basic of human rights such as medical care.⁴⁹

Statelessness can also be a precursor to, or a root cause of, forced or irregular migration or trafficking, as recently acknowledged in the 2016 *Bali Declaration on People Smuggling, Trafficking in Persons and Transnational Crime*.⁵⁰ Given that such populations commonly lack identity documentation, legal recognition and protection from their state of origin or former habitual residence, they are often unable to return. This is why it is so important that countries of asylum establish a credible system for identifying and ensuring that a protective status is granted to stateless persons in accordance with international law.

III THE INTERNATIONAL LEGAL FRAMEWORK AND AUSTRALIA’S OBLIGATIONS

The two core treaties pertinent to statelessness are the *1954 Convention* and the *1961 Convention*. The majority of stateless persons live in the country of their birth or long-term residence and have never crossed an international border. This means that the answer to their predicament is more likely to

⁴⁶ 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, 254–6; Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’, above n 1, 159.

⁴⁷ Nicole Green and Todd Pierce, ‘Combatting Statelessness: A Government Perspective’ (2009) 32 *Forced Migration Review* 34, 34; Achiron and Govil, above n 45, 5.

⁴⁸ See, eg, UNHCR, *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness* (UNHCR Division of International Protection, 2015); Jacqueline Bhabha (ed), *Children without a State: A Global Human Rights Challenge* (MIT Press, 2011); *Guidelines on Statelessness No 4*, UN Doc HCR/GS/12/04; Maureen Lynch and Melanie Teff, ‘Childhood Statelessness’ (2009) 32 *Forced Migration Review* 31.

⁴⁹ UNHCR, *I Am Here, I Belong*, above n 48, 1.

⁵⁰ *Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime*, Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (23 March 2016) 2 [4]. We thank Nicholas Oakeshott for this reference.

require reform of the nationality laws of their own state (the focus of the *1961 Convention*), rather than formal recognition as 'stateless persons'.⁵¹ By contrast, the *1954 Convention* establishes a legal status for stateless persons which is particularly relevant to those who find themselves in another country. The provisions of that treaty are the focus of the analysis in the present article given that most stateless persons in Australia have arrived in, and seek the protection of, Australia by virtue of their statelessness.

As mentioned above, it was originally intended that the Ad Hoc Committee on Statelessness and Related Problems would draft a treaty to resolve the status of *both* stateless persons and refugees. However, in its report to the UN Economic and Social Council in 1950,⁵² the Committee confined its draft text to refugees, with the status of stateless persons relegated to a proposed additional protocol under which states might agree to extend the application of the *Refugee Convention mutatis mutandis* to stateless persons who were not otherwise covered.⁵³ Although a draft protocol was referred to the Conference of Plenipotentiaries that drafted the *Refugee Convention*,⁵⁴ it decided to refer it back to the appropriate organs of the UN for further study.⁵⁵

In September 1954, the UN Economic and Social Council convened a Conference of Plenipotentiaries on the Status of Stateless Persons, which formulated, debated and produced a draft treaty in September 1954.⁵⁶ Australia was one of only 27 states to participate in the Conference,⁵⁷ and was

⁵¹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 25 [58]; see also at 26 [59]–[60].

⁵² *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, UN ESCOR, 1st sess, UN Docs E/1618, E/AC.32/5 (17 February 1950).

⁵³ *Ibid* annex III (*Proposed Protocol Relating to the Status of Stateless Persons*); *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, UN ESCOR, 2nd sess, UN Docs E/AC.32/8, E/1850 (25 August 1950) annex II (*Draft Protocol Relating to the Status of Stateless Persons*); Goodwin-Gill, *Introductory Note: Convention Relating to the Status of Stateless Persons*, above n 2; Goodwin Gill, 'The Rights of Refugees and Stateless Persons', above n 2, 381.

⁵⁴ *Draft Convention Relating to the Status of Refugees*, GA Res 429 (V), UN GAOR, 5th sess, 325th plen mtg, UN Doc A/RES/429(V) (14 December 1950).

⁵⁵ For the subsequent history, see Goodwin-Gill, *Introductory Note: Convention Relating to the Status of Stateless Persons*, above n 2.

⁵⁶ *Draft Protocol Relating to the Status of Stateless Persons*, ESC Res 526A (XVII), UN ESCOR, 17th sess, 784th plen mtg, UN Doc E/RES/526(XVII) (26 April 1954).

⁵⁷ *Final Act of the United Nations Conference on the Status of Stateless Persons*, 360 UNTS 117 (28 September 1954) 118.

an active member of the Drafting Committee on the Definition of the Term ‘Stateless Person’.⁵⁸

The *1954 Convention* was adopted on 23 September 1954 and came into force on 6 June 1960 (with its sixth ratification). Australia acceded to it in December 1973 without reservation⁵⁹ — the same day that it ratified the *1961 Convention* (focused on addressing the underlying problem of statelessness itself). However, whereas the *1951 Refugee Convention* and its *1967 Protocol*⁶⁰ enjoy widespread ratification with 147 states parties, the *1954 Convention* still has only 89 states parties.⁶¹

The object and purpose of the *1954 Convention* is to ‘regulate and improve the status of stateless persons by an international agreement’ and to secure for them ‘the widest possible exercise of [their] fundamental rights and freedoms’.⁶² The UNHCR observes that the *1954 Convention* remains the ‘only international treaty aimed specifically at regulating the standards of treatment for stateless persons’ and, therefore, ‘is of critical importance in ensuring the protection of this vulnerable group’.⁶³

The *1954 Convention* provides an almost identical legal status to stateless persons as that afforded to refugees under the *Refugee Convention*. This is perhaps unsurprising given that the drafters used, inter alia, the provisions of the *Refugee Convention* as the basis of their discussions.⁶⁴ Thus, it sets out a broad range of civil, economic, social and cultural rights divided into four categories: juridical status, gainful employment, welfare, and administrative

⁵⁸ The Drafting Committee comprised the President of the Conference and representatives of Australia, Belgium, Brazil, the Federal Republic of Germany, France, Israel and the United Kingdom: *ibid* 120.

⁵⁹ UN Treaty Collection, *4. Convention on the Reduction of Statelessness*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf>>.

⁶⁰ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁶¹ As at September 2016.

⁶² *1954 Convention* Preamble.

⁶³ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 3 [3].

⁶⁴ Recall that the Ad Hoc Committee prepared a draft protocol that in essence applied the provisions of the *Refugee Convention mutatis mutandis* to stateless persons: see above n 53 and accompanying text. Batchelor suggests that the drafters thought they were not authorised to make any additions to the draft protocol, and furthermore ‘that it would be wise not to try to amend the articles of the *Geneva Convention*, but to restrict itself to deciding whether or not to insert them in the instrument on the status of stateless persons’: Conference of Plenipotentiaries on the Status of Stateless Persons, *Summary Record of the Fifth Meeting*, UN Doc E/CONF.17/SR.5 (29 September 1954) 3, quoted in Batchelor, ‘Stateless Persons’, above n 21, 245.

measures.⁶⁵ Nevertheless, there are several important differences, including a lower standard of protection for stateless persons in relation to some rights,⁶⁶ and an absence of others, most notably the principle of *non-refoulement*.⁶⁷

In addition to the two specialist statelessness treaties, Australia is a party to key human rights instruments that impose obligations relevant to the prevention and reduction of statelessness, and the protection of stateless persons.⁶⁸

As well as these binding treaty obligations, there are a number of other relevant developments that provide important context to assessing Australia's protection of stateless persons. As a member of the UNHCR's Executive

⁶⁵ See UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 46 [129]; 1954 *Convention* arts 12–32; Batchelor, 'The 1954 Convention', above n 23, 45–51.

⁶⁶ There is a lower standard of treatment than the *Refugee Convention* with respect to freedom of association and the right to work (1954 *Convention* arts 15, 17), no equivalent guarantee against penalisation for illegal entry (cf *Refugee Convention* art 31) and a different scope of protection with respect to expulsion. See also Goodwin-Gill, *Introductory Note: Convention Relating to the Status of Stateless Persons*, above n 2; UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 46 [127]. For a detailed analysis of the provisions of the treaty see van Waas, *Nationality Matters*, above n 39.

⁶⁷ This was because, as the drafting history reveals, the drafters thought that art 33 of the *Refugee Convention* was 'an expression of the generally accepted principle'. In the *Final Act of the United Nations Conference on the Status of Stateless Persons*, 360 UNTS 117 (28 September 1954) 118, 122, 124, the drafters provided:

Being of the opinion that Article 33 of the *Convention Relating to the Status of Refugees* of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, Has not found it necessary to include in the *Convention Relating to the Status of Stateless Persons* an article equivalent to Article 33 of the *Convention Relating to the Status of Refugees* of 1951.

⁶⁸ See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 15; 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 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 the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7. See also the 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons': 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, 57th sess, Agenda Item 14, UN Doc A/AC.96/1035 (10 October 2016) 13–17 [18] ('*Report of the Fifty-Seventh Session*'); van Waas, *Nationality Matters*, above n 39, 395–8.

Committee, Australia participated by consensus in the formulation of the 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' in 2006.⁶⁹ Among other things, this:

Calls on States not to detain stateless persons on the sole basis of their being stateless and to treat them in accordance with international human rights law and also *calls on* States Parties to the 1954 *Convention relating to the Status of Stateless Persons* to fully implement its provisions ...⁷⁰

In 2011, on the 50th anniversary of the 1961 *Convention* and the 60th anniversary of the *Refugee Convention*, the UNHCR convened a Ministerial Intergovernmental Event to mark these anniversaries and to invite states to make concrete commitments to improve protection and assistance to refugees and stateless persons. Whereas the two statelessness Conventions had long been under-subscribed and the phenomenon of statelessness had been 'largely absent from the global human rights agenda',⁷¹ the event increased momentum on this issue. Thirty-three states pledged to accede to one or both statelessness treaties, and more than 40 states undertook to implement other measures to reduce statelessness, such as by reforming domestic nationality laws.⁷² Although these pledges were not legally binding, they provide an important benchmark for evaluating whether the protection of stateless persons globally has improved in the past five years, including prevention, reduction and identification of statelessness.⁷³

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 nationali-

⁶⁹ *Report of the Fifty-Seventh Session*, UN Doc A/AC.96/1035, 13–17 [18].

⁷⁰ *Ibid* 17 [18] para (w).

⁷¹ Tamás Molnár, 'Remembering The Forgotten: International Legal Regime Protecting the Stateless Persons — Stocktaking and New Tendencies' (2014) 11 *US-China Law Review* 822, 825.

⁷² UNHCR, *Pledges 2011*, above n 14, 12, 32–3.

⁷³ Australia's inaction is also in stark contrast to the efforts by other states. Twenty-two of the states in attendance at the 2011 Ministerial meeting have fulfilled their pledges and 10 states have taken other actions towards addressing statelessness, even though such actions were not contained in any pledge: see UNHCR, *State Action on Statelessness* <<http://web.archive.org/web/20150905202236/http://www.unhcr.org/pages/4ff2bdf6.html>>.

ty. Australia will continue to work with UNHCR, civil society and interested parties to progress this pledge.⁷⁴

This declaration reinforced contemporaneous statements by the Australian government that it intended to create a statelessness status determination procedure within the framework of the *Migration Act 1958* (Cth) (*'Migration Act'*). However, the government subsequently decided to create only internal departmental procedures to determine statelessness,⁷⁵ and stated that a dedicated visa for stateless persons would not be considered.⁷⁶

It is against this background that we examine current Australian law to assess how fully it reflects Australia's international obligations to protect stateless persons, and to recommend how greater compliance might be achieved.

IV THE EXTENT OF STATELESSNESS IN AUSTRALIA

There is no comprehensive, publicly available governmental record of the number of stateless persons in Australia. The Australian Bureau of Statistics does not collect information either on the number or location of stateless persons in Australia,⁷⁷ and there is no mechanism in place to identify them. As the Equal Rights Trust has observed, '[t]he stark absence of accessible data on statelessness in Australia is reflected in the fact that Australia consistently registers "nil" under the category of stateless persons in the UNHCR annual report'.⁷⁸ This is not a uniquely Australian phenomenon; rather, improving 'quantitative and qualitative data on stateless populations' is one of the ten actions to end statelessness listed in the UNHCR's *Global Action Plan to End*

⁷⁴ UNHCR, *Pledges 2011*, above n 14, 49. Additionally, the Australian delegate to the UNHCR Standing Committee on 22 June 2011 had pledged to UNHCR that Australia would develop a process for identifying and registering stateless persons in order to adhere to its obligations pursuant to the *1954 Convention: Refugee Council of Australia, Australia's Statelessness Status Determination Procedure*, 1, 1 n 1 <<http://www.refugeecouncil.org.au/r/se/1/120600-SSD.pdf>>.

⁷⁵ This was explained by the Department of Immigration and Citizenship (Cth) at a meeting of the Onshore Protection Consultative Group on 16 November 2011.

⁷⁶ Onshore Protection Consultative Group, 'Statelessness Status Determination Briefing Paper' (16 November 2011). The change in direction followed the appointment of a new Immigration Minister, although this was never formally cited as the reason for the volte-face.

⁷⁷ Tarek Abou Chabake, 'Presentation' (Paper Presented at the Workshop on Researching Statelessness and Citizenship in Asia and the Pacific, Melbourne Law School, January 2016).

⁷⁸ Equal Rights Trust, above n 13, 112. Subsequent annual reports (since 2010) have continued this trend.

Statelessness 2014–24.⁷⁹ In the absence of specific procedures to identify stateless persons, it is unclear how many people go ‘unnoticed and unidentified’.⁸⁰

While statelessness itself is not an independent ground for being granted protection in Australia, it may be relevant (or even central) to a refugee or complementary protection claim. Thus, there is some data available about the numbers of people granted protection visas — as refugees or beneficiaries of complementary protection — who were also identified as being stateless.⁸¹ However, it must be emphasised that the lack of a coordinated or consistent approach to recording or monitoring numbers of stateless persons in Australia means that any available data is necessarily piecemeal and provides only part of the picture. For example, reliable statistics post-2012–13 are not available,⁸² and as such, the Tables below do not provide a full account of these issues in recent years. In addition, the deficiencies in the process for identifying stateless persons, outlined below, suggest further reasons why these figures are incomplete.

However, we can discern that there has clearly been an increase in the number of stateless asylum seekers classified as ‘illegal maritime arrivals’ (‘IMAs’) seeking protection in Australia as indicated in Table 1. For example, in the 2012–13 period, 18 119 people arrived by sea and were screened into a

⁷⁹ UNHCR, *Global Action Plan*, above n 35, 24, 7.

⁸⁰ Batchelor, ‘The 1954 Convention’, above n 23, 40.

⁸¹ Department of Immigration and Border Protection (Cth), *Asylum Trends: Australia — 2012–13 Annual Publication* (2013). It defines a stateless person as ‘an individual who self identifies as stateless, who lacks identity as a national of a state for the purpose of law and is not entitled to the rights, benefits, or protection ordinarily available to a country’s nationals’: at 36. The Department’s most recent publication with regard to humanitarian arrivals to Australia does not provide any statistics or information in relation to stateless refugee populations in Australia: Department of Immigration and Border Protection (Cth), *Australia’s Offshore Humanitarian Programme: 2013–14* (2014).

⁸² This is likely due in large part to the fact that processing of applications for protection visas was suspended from the Expert Panel’s report in 2012. While it has recently recommenced, the ‘fast track’ system is still in its early days. As at 31 January 2016, 28 705 asylum seekers were living in the community after being granted a Bridging Visa E: Department of Immigration and Border Protection (Cth)/Australian Border Force, *Immigration Detention and Community Statistics Summary* (31 January 2016) 4. There is no information publicly available as to the number of asylum seekers in this group that are stateless. As at 30 June 2015 there were approximately 2702 persons who the Department classified as stateless, who had been granted the Bridging Visa E: Australian Border Force, *Illegal Maritime Arrivals on Bridging E Visas*, June 2015 <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/ima-bve-June-15.pdf>>.

refugee status determination process.⁸³ Of this group, there were 1608 stateless applicants, which was the fourth largest cohort.⁸⁴

Table 1: Refugee Status Determination Requests Received by Stateless IMAs⁸⁵

| Time period | Requests for refugee status determination |
|-------------|---|
| 2008–9 | 24 |
| 2009–10 | 463 |
| 2010–11 | 861 |
| 2011–12 | 603 |
| 2012–13 | 1608 ⁸⁶ |

The following Table shows the Primary Protection Visa grant rate for IMAs by first-instance government decision-makers over a similar time period. It shows that while success rates have fluctuated, in some years quite dramatically, on the whole there has been a reasonably strong rate of success.

Table 2: Primary Protection Visa Grant Rates for Stateless IMAs⁸⁷

| Time period | Grants | Refusals | Grant rate (%) |
|-------------|--------|----------|----------------|
| 2008–9 | 5 | 0 | 100.0 |
| 2009–10 | 173 | 79 | 68.7 |
| 2010–11 | 373 | 503 | 42.6 |
| 2011–12 | 298 | 122 | 71.0 |
| 2012–13 | 297 | 41 | 87.9 |
| Total | 1146 | 745 | |

⁸³ Department of Immigration and Border Protection (Cth), *Asylum Trends*, above n 81, 24.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ This represented 9 per cent of all refugee status determination requests in that period: *ibid.*

⁸⁷ *Ibid.* 27.

Following merits review of such decisions for IMAs who arrived and were interviewed before 24 March 2012 (known as the independent merits review/independent protection assessment), the outcomes were as follows:

Table 3: Review Recommendations by Countries by Stateless IMAs⁸⁸

| Time period | Refugees | Not Refugees |
|-------------|----------|--------------|
| 2009–10 | 10 | 0 |
| 2010–11 | 132 | 11 |
| 2011–12 | 406 | 52 |
| 2012–13 | 81 | 32 |
| Total | 629 | 95 |

The following Table shows the figures for stateless persons who arrived by plane ('non-illegal maritime arrivals', or 'non-IMAs') between 2008 and 2013 and were granted protection visas by the Department of Immigration and Border Protection.

Table 4: Final Determinations for Stateless Non-IMAs⁸⁹

| Time period | Grants | Grant rate (%) |
|-------------|--------|----------------|
| 2008–9 | 15 | 83.3 |
| 2009–10 | 16 | 94.1 |
| 2010–11 | 18 | 75.0 |
| 2011–12 | 28 | 90.3 |
| 2012–13 | 45 | 91.8 |

⁸⁸ Ibid 29.

⁸⁹ Ibid 20.

Of course, all these statistics must be approached with caution as they do not provide any breakdown by cohort, ethnicity, or country of former habitual residence. Thus, it is likely that the overall approval rates for some groups will vary dramatically from others, as is the case in refugee status determination in Australia in general.⁹⁰ The figures are broadly comparable with overall rates of success for onshore arrivals who are not stateless, indicating that the Australian government accepts the fundamental proposition that stateless persons can qualify for refugee status if they meet the requirements of the refugee definition.⁹¹ However, it is important to note that the lack of a statelessness status determination procedure, and the deficiencies outlined below in existing departmental guidelines relevant to identifying stateless persons, means that there is currently no verifiable method of discerning overall success rates for de jure stateless persons who seek protection in Australia.

While the precise ethnic composition of stateless persons in Australia is unclear, there is agreement about the predominant groups. According to the Department of Immigration and Border Protection's *Procedures Advice Manual 3* ('PAM3'), '[t]he four largest cohorts of PV [Protection Visa] applicants claiming to be stateless [in Australia] are: Burmese Rohingya, Failsi Kurds (from Iran and Iraq), Kuwaiti Bidoon,⁹² and Palestinians (from Iraq).'⁹³

In terms of those in immigration detention who are awaiting status determination or deportation, government figures suggest that as at 30 September 2015, 81 people in immigration detention in Australia (including the Australian mainland and Christmas Island) were classified as stateless by the Department.⁹⁴ It is important to note that there is no publically available information as to how the Department has classified such persons as stateless. Additionally, since there is no stateless determination process in Australia, as discussed below, it is likely that people could be wrongly classified and the number of persons who are stateless and in detention could be much higher.

⁹⁰ For example, an analysis of Refugee Review Tribunal annual reports indicates that there can be very significant divergences in terms of success rates between applicants based on country of origin.

⁹¹ See below Part V.

⁹² Also referred to as Bedoun, Bedoon, Bidun and Bidoun.

⁹³ Department of Immigration and Border Protection (Cth), *Procedures Advice Manual 3: Refugee and Humanitarian — Protection Visas — All Applications — Common Processing Guidelines* (16 February 2016) 126 [80.1]. The authors refer to the February 2016 version of this source, which was the most current at the time of writing. Note that the October 2016 version is substantially similar for the purposes of this article.

⁹⁴ Department of Immigration and Border Protection (Cth)/Australian Border Force, *Immigration Detention and Community Statistics Summary* (30 September 2015) 8.

There is no information publicly available as to the number of stateless persons detained in offshore processing centres in Nauru and Manus Island. However, recent news reports suggest that unsuccessful stateless applicants could be detained in Papua New Guinea's gaols since they have no country to which they can return.⁹⁵ Neither Papua New Guinea nor Nauru has ratified the *1954 Convention*.⁹⁶

Stateless persons come to Australia not only as onshore spontaneous arrivals but also through the humanitarian resettlement programme. Statistics compiled by the Refugee Council of Australia from the Department's settlement reporting facility detail the number of stateless people from 2009–14 who were granted permanent residency (and who have therefore either become Australian citizens or are at least on a pathway to naturalisation in Australia). These figures include 3156 people accepted through the refugee and humanitarian programme, 302 people from the family migration stream, 23 people from the skilled migration stream and one person from an unidentified migration stream.⁹⁷ Since the majority of applicants were granted permanent residency through the refugee and humanitarian programme, an analysis of the ethnicities of formerly stateless persons in Australia may provide further guidance on the ethnic composition of stateless asylum seekers and refugees in Australia. The Refugee Council of Australia has also reported that:

The most common countries of birth for stateless people granted permanent residency in Australia between 2009–10 and 2013–14 were Iran and Iraq, with Kurdish the most common ethnicity. Other common countries of birth included the Democratic Republic of the Congo, Burma, Kuwait, Tibet, India and Lebanon. Other common ethnicities included Arab, Rohingya and Tibetan.⁹⁸

In sum, the limited available statistics, the absence of a procedure to systematically identify stateless persons and a lack of clarity about the definitions or process relied upon to compile the numbers outlined above make it impossi-

⁹⁵ 'Stateless Could Be Transferred to PNG Jail', SBS (online), 2 August 2015 <<http://www.sbs.com.au/news/article/2015/08/02/stateless-could-be-transferred-png-jail>>.

However, this is now subject to question in light of the decision of the Supreme Court of Papua New Guinea on 26 April finding that the detention of asylum seekers and refugees was unconstitutional: see *Namah v Pato* [2016] PGSC 13 (26 April 2016).

⁹⁶ UN, *Multilateral Treaties Deposited with the Secretary-General*, vol I, 490, UN Doc ST/LEG/SER.E/26 (2009).

⁹⁷ Refugee Council of Australia, *Statelessness in Australia* (2015) 10–11.

⁹⁸ *Ibid* 11.

ble to identify the number or background of stateless persons in Australia with any certainty. A comprehensive empirical mapping study of statelessness in Australia is needed to better understand the population profile of stateless persons (and persons at risk of statelessness) in Australia.⁹⁹ What is clear, however, is that Australia's international obligations in respect of stateless persons are engaged by at least a proportion of those who seek protection each year.

V THE PROTECTION OF STATELESS PERSONS IN AUSTRALIA

Like the *Refugee Convention*, the *1954 Convention* is silent on the procedure required for status determination. Clearly, however, in order to determine who is a 'stateless person' — and thus who is owed the rights and entitlements provided for in that treaty — a procedure for determining statelessness is necessary.¹⁰⁰

Australia does not have such a procedure within its legislative framework. The mechanism through which Australia seeks to implement certain of its international protection obligations is s 36 of the *Migration Act*. Since 2011, it has provided protection not only to those who qualify for refugee status (pursuant to the *Refugee Convention*)¹⁰¹ but also to people to whom Australia owes *non-refoulement* obligations under the *Convention against Torture* ('CAT') and the *ICCPR* (known as complementary protection).¹⁰² The Act

⁹⁹ For a detailed study of statelessness in the United Kingdom see UNHCR/Asylum Aid, *Mapping Statelessness in the United Kingdom* (2011) <<http://www.asylumaid.org.uk/mapping-statelessness-in-the-united-kingdom/>>.

¹⁰⁰ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 52 [144]. For a detailed overview, see at 6 [8] (citations omitted):

Whilst the *1954 Convention* establishes the international legal definition of 'stateless person' and the standards of treatment to which such individuals are entitled, it does not prescribe any mechanism to identify stateless persons as such. Yet, it is implicit in the *1954 Convention* that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their *Convention* commitments. This Handbook advises on the modalities of creating statelessness determination procedures, including questions of evidence that arise in such mechanisms.

¹⁰¹ We note that the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) has removed the reference to the *Refugee Convention* from the Act, but the definition remains anchored in the treaty definition, subject to some modifications.

¹⁰² *Migration Act* s 36(2A) provides that:

A non-citizen will suffer significant harm [and thus receive protection] if:
 (a) the non-citizen will be arbitrarily deprived of his or her life; or

deliberately has not been extended to stateless persons who do not also qualify for refugee status or complementary protection.¹⁰³ While refugees and stateless persons are similarly situated, '[s]tatelessness and refugee status are by no means identical phenomena.'¹⁰⁴

A *Protection for Stateless Persons Pursuant to the Refugee Convention*

As mentioned above, the drafters of the *Refugee Convention* made an explicit decision to confine the scope of the *Refugee Convention* to refugees, preferring that *de jure* stateless persons (who were not also refugees) be dealt with in a distinct instrument. However, it was nonetheless recognised that stateless persons could qualify for refugee status if they were unable to return to their country of habitual residence owing to a well-founded fear of being persecuted for a *Refugee Convention* reason. Accordingly, art 1(A)(2) of the *Refugee Convention* defines a refugee as someone:

[who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or *who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*¹⁰⁵

We know that 'most refugees today are not stateless, and most stateless persons are not refugees.'¹⁰⁶ Yet, most states do not have a separate regime in place for determining statelessness. For those that do, the UNHCR recommends that each claim should be separately assessed and both statuses recognised,¹⁰⁷ although refugee status should be considered first, given the

- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

¹⁰³ It applies to stateless persons who are refugees or who meet the complementary protection criteria, but not to people who are 'just' stateless.

¹⁰⁴ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 68.

¹⁰⁵ *Refugee Convention* art 1(A)(2) (emphasis added).

¹⁰⁶ *Refugee Status*, UN Doc PPLA/2014/01, 15. See generally, UNHCR, *The State of the World's Refugees 2012: In Search of Solidarity* (Oxford University Press, 2012) 108–9.

¹⁰⁷ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 31 [78].

more beneficial terms of the rights regime set by the *Refugee Convention* (described above). Many stateless persons have been found to be refugees and been given protection pursuant to the *Refugee Convention* regime, and there is now a substantial body of jurisprudence that has developed globally over several decades. Yet, there is little academic examination of this jurisprudence, including in Australia.¹⁰⁸

In order to analyse the adequacy of Australia's domestic law in protecting stateless persons, this Part of the article considers: (a) the relevant Ministerial guidelines issued to guide first instance decision-making by government officials;¹⁰⁹ and (b) decisions by the Refugee Review Tribunal ('RRT'),¹¹⁰ Federal Circuit Court and Federal Court of Australia published between 1 January 2004 and 21 August 2015,¹¹¹ focused on the four main ethnic groups from which people have claimed to be stateless refugees: Faili Kurd, Palestinian, Rohingya and Bidoon.¹¹² Research focused on these four ethnicities returned 127 decisions of the RRT, Federal Court of Australia, Federal Court of Australia Full Court, Federal Circuit Court and the Administrative Appeals Tribunal. However, due to the fact that only a minority of decisions of the RRT are publicly available,¹¹³ it is impossible to undertake a comprehensive analysis of how claims for protection in Australia by stateless applicants are assessed. Hence, this section of the article does not purport to provide a quantitative picture, but rather is designed to identify the key issues and challenges faced by stateless persons in seeking protection in Australia.¹¹⁴

¹⁰⁸ The key exception is *Refugee Status*, UN Doc PPLA/2014/01.

¹⁰⁹ Department of Immigration and Border Protection (Cth), *PAM3*, above n 93. See also Minister for Immigration and Border Protection (Cth), *Direction [No 56] — Consideration of Protection Visa Applications*, 21 June 2013, which was issued pursuant to s 499(1) of the *Migration Act*, and enables the Minister to 'give written directions to a person or body having functions or powers under this Act if the directions are about: (a) the performance of those functions; or (b) the exercise of those powers.'

¹¹⁰ The Refugee Review Tribunal has since been subsumed into the Administrative Appeals Tribunal ('AAT') as a special division.

¹¹¹ The decisions listed below are not an exhaustive list of the decisions relevant to each issue, but rather a sampling of decisions.

¹¹² See above nn 92–3 and accompanying text.

¹¹³ The proportion of cases publicly available has changed over time and has most recently reported to be approximately 40 per cent of all decisions before the RRT. However, at earlier stages it was much lower. Further, there is not a clear methodology for determining which cases are made publicly available. It is unclear what proportion of the decisions by the AAT's Migration and Refugee Division will be made available.

¹¹⁴ Additionally, since a search on the term 'stateless' returns the vast majority of reported protection decisions on the Australian Legal Information Institute ('AustLII') (as most cite

Ministerial *Direction [No 56] — Consideration of Protection Visa Applications*¹¹⁵ requires:

decision-makers, including the Tribunal, to take account of the Department of Immigration's 'PAM3: Refugee and [H]umanitarian — Complementary Protection Guidelines' and 'PAM3: Refugee and [H]umanitarian — Refugee Law Guidelines' to the extent that they are relevant to the decision under consideration.¹¹⁶

The latter contains a part called 'Assessing claims of statelessness guidelines', whose stated purpose is 'to help PV decision-makers make findings in relation to claims of statelessness for the purpose of a PV assessment.'¹¹⁷ Protection Visa decisions relate to whether or not someone is a refugee or in need of complementary protection. Indeed, *PAM3* notes that:

Statelessness is not defined in the Act and there is no legislative basis for making a determination of whether an applicant is stateless. Instead, assessing claims of statelessness: is an administrative process closely linked to establishing identity, and supports a robust PV assessment, especially where the harm relates to statelessness.¹¹⁸

Accordingly, a key initial criticism of the *PAM3* is that although the statelessness guidelines were formulated in response to Australia's 2011 pledge 'to better identify stateless persons and assess their claims',¹¹⁹ their scope is limited to refugee and complementary protection assessments. As explained

the art 1(A)(2) refugee definition, which is paraphrased to include that term), it was not possible to consider how Australian courts and tribunals have considered all stateless applicants without searching for specific countries of former habitual residence or ethnic groups.

¹¹⁵ Minister for Immigration and Border Protection (Cth), *Direction [No 56] — Consideration of Protection Visa Applications*, 21 June 2013.

¹¹⁶ Migration and Refugee Division Legal Services Section, Administrative Appeals Tribunal, *Guide to Refugee Law: Chapter 12 — Merits Review of Protection Visa Decisions* (2016) 12-4 <<http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/guide-to-refugee-law>>. With respect to *PAM3*'s role in decision making, the guidelines state that:

Being statements of departmental policy, *PAM3* instructions must be considered and given due weight by ministerial delegates in deciding applications and exercising associated decision-making powers. Policy must not, however, be regarded as inflexible and decision-makers must not give it the same force as law.

Department of Immigration and Border Protection (Cth), *Procedures Advice Manual 3: Contents and Readers Guide* (10 September 2016) 29.

¹¹⁷ Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 125 [75].

¹¹⁸ *Ibid* 125 [76].

¹¹⁹ UNHCR, *Pledges 2011*, above n 14, 49.

above, the Act does not currently protect stateless persons who do not also fall into one of these categories. *PAM3* does not respond to the broader question of how to identify, and resolve the status of, stateless persons covered by the statelessness Conventions, which was the intention behind the UNHCR's request for state pledges in 2011.¹²⁰ However, given that the guidelines are relevant to assessing claims by stateless persons pursuant to the *Refugee Convention* and complementary protection provisions, they warrant examination in those contexts.

1 *Statelessness Per Se as a Basis for Refugee Status?*

It is now widely accepted that 'mere statelessness or inability to return to one's country of former habitual residence [is] insufficient of itself to confer refugee status under the *Convention*'.¹²¹ This has been the conclusion in all jurisdictions that have examined the question.¹²²

This issue was discussed at length in several decisions of the Federal Court of Australia in the late 1990s.¹²³ In *Savvin v Minister for Immigration and Multicultural Affairs*, Dowsett J concluded that although persons with a nationality were required to establish a well-founded fear of being persecuted, stateless persons only had to show that they were unable or unwilling to return to their country of former habitual residence.¹²⁴ This was based on a

¹²⁰ Jane McAdam, *Response to Department of Immigration and Citizenship (Cth), PAM3 — Assessing Claims of Statelessness* (October 2012).

¹²¹ *Revenko v Secretary of State for the Home Department* [2001] QB 601, 601.

¹²² *Refugee Status*, UN Doc PPLA/2014/01, 36. See, eg, *Thabet v Minister of Citizenship and Immigration* [1998] 4 FC 21 (Canada); *Refugee Appeal No 72635/01* (Unreported, Refugee Status Appeals Authority, Chairperson Haines and Member Plunkett, 6 September 2002) (New Zealand); *AAAAD v Refugee Appeals Tribunal* [2009] IEHC 326 (17 July 2009) (Ireland); *Maksimova v Holder*, 361 Fed Appx 690, 693 (6th Cir, 2010) (United States); *Immigration and Refugee Protection Act*, SC 2001, c 27, s 2(1) (definition of 'refugee convention'); *Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted* [2011] OJ L 337/9, art 2(c). However, note that under human rights law, 'the issue of whether there would be serious obstacles to re-admission must remain central to the question of whether there is a real risk of serious harm': *YL (Nationality-Statelessness-Eritrea-Ethiopia) Eritrea CG v Secretary of State for the Home Department* [2003] UKIAT 00016 (30 June 2003) [64] (Vice President Storey) ('*YL Eritrea*'), quoted in *Refugee Status*, UN Doc PPLA/2014/01, 39, which also analyses this approach.

¹²³ See, eg, *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421, 427–8 (Cooper J) ('*Rishmawi*').

¹²⁴ (1999) 166 ALR 348.

literal interpretation of the refugee definition in art 1(A)(2) of the *Refugee Convention*, and, in particular, the presence of a semi-colon separating the conditions required to be satisfied by refugees with a nationality from those required to be satisfied by refugees without one. Dowsett J posited that ‘the definition is in two parts — that preceding the semicolon and that following it’,¹²⁵ and hence reasoned that the inclusion of ‘well-founded fear of being persecuted’ in the first but not the second part meant that a stateless person who was simply unable to return to his or her country of former habitual residence could be a refugee.¹²⁶ In Dowsett J’s opinion, this interpretation was supported by a view that stateless persons were in as much need of protection as refugees, and that ‘[t]he underlying humanitarian philosophy of the *Convention* is that displaced persons should be given an opportunity to rebuild their lives with a relative degree of security.’¹²⁷

However, on appeal to the Full Federal Court, this position was not adopted. As Katz J explained there, ‘even giving the semicolon its full weight as a constructional aid, I take the view that, in accordance with accepted grammatical principles, the semi-colon does not do the work of dividing the definition into two independent parts’.¹²⁸ Instead, the Court took the view that all applicants for refugee status — whether stateless or not — must establish that they ‘have a well-founded fear of being persecuted for a *Convention* reason.’¹²⁹ This was based on a different literal reading — in particular, the presence of the words ‘such fear’ in the latter part of the definition¹³⁰ — as well as the *travaux préparatoires*,¹³¹ and the approach adopted by foreign courts.

¹²⁵ Ibid 361 [47].

¹²⁶ Ibid 357–8 [32]–[33], 362 [51].

¹²⁷ Ibid 371 [88].

¹²⁸ *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168, 185 [82]; see also at 186 [85]–[86].

¹²⁹ Ibid 170 [8] (Spender J).

¹³⁰ Ibid 177–86 [46]–[86] (Katz J); see also at 169 [2], 169–70 [7] (Spender J), 170 [10] (Drummond J), although note Drummond J’s disagreement about the weight that should be given to punctuation in treaty interpretation at 173–4 [24]–[29].

¹³¹ For a thorough discussion of the *travaux* on this issue see Guy Goodwin-Gill, ‘Stateless Persons and Protection under the 1951 *Convention*’ (Paper presented at the Symposium on Recent Developments in Immigration Law, Bar of Québec, 22 January 1993); *Rishmawi* (1997) 77 FCR 421.

This position has since been affirmed,¹³² and courts have uniformly made clear that where stateless persons claim protection under the *Refugee Convention*, 'refugee status must be assessed on the basis of the usual criteria, that is by demonstrating a well-founded fear of being persecuted for a *Convention* reason'.¹³³

While this may reflect a principled approach, and, indeed, the object and purpose of the *Refugee Convention*, there are several ways in which the claims of stateless persons raise unique issues that may not be adequately addressed by refugee law. Even when a decision-maker is engaged solely in assessing whether or not a stateless person meets the refugee definition, the inadequacy of processes to determine statelessness may pose obstacles.

2 *Assessing Whether a Person is Stateless*

For the purposes of assessing a stateless person's claim to refugee status under art 1(A)(2) of the *Refugee Convention*, the pertinent question is whether he or she can be understood as 'not having a nationality'. While phrased in similar, although not identical, terms to art 1(1) of the *1954 Convention's* stipulation that a stateless person is 'not considered as a national by any State under the operation of its law',¹³⁴ refugee decision-makers do not usually make reference to the *1954 Convention* in assessing this element of the refugee definition. Ascertaining whether a person has a nationality is, however, a vital first step in the examination of any protection claim because a finding that a person is stateless directs the decision-maker to the second part of the refugee definition (and, hence, to the question of the country of former habitual residence as the reference country, which is crucial to the nature of the harm feared). It is also often the core of the claim where a stateless person relies on an absence of nationality as the source of his or her fear of being persecuted.

PAM3 appropriately states that '[i]f an applicant claims to be stateless, this issue should be considered and if possible a finding made before their

¹³² *Tontegode v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 131 (15 May 2002) [5]; *QAEE of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 46 (17 March 2003) [12].

¹³³ Hathaway and Foster, above n 7, 70 (citations omitted).

¹³⁴ The *PAM3* recognises this in noting that for the purposes of the *1954 Convention* the term 'stateless' means 'a person who is not considered as a national by any state under the operation of its law'. For the purposes of the *Refugee Convention*, the *PAM3* states that statelessness is 'established where no country recognises the person as holding citizenship': Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 125–6 [78].

protection claims are assessed.¹³⁵ However, *PAM3* overlooks the extensive guidance that now exists internationally on both the substantive and procedural aspects of determining whether or not a person is stateless.¹³⁶

First, *PAM3* outlines a list of possible interview questions to assist in assessing statelessness.¹³⁷ However, they do not provide detail as to who bears the so-called onus of proof, the required standard of proof, or whether some information may be accorded greater weight than other information.¹³⁸

Many individuals will face significant challenges in demonstrating that they are stateless precisely because of their limited access to evidence and documentation. For this reason, applicants 'should not bear sole responsibility for establishing the relevant facts.'¹³⁹ Rather, the burden should be shared by the applicant and the decision-making authority. That authority must identify which authorities in the relevant reference country are competent to establish nationality, based on the law and practice of those countries.¹⁴⁰ Where an individual can show, on the basis of all reasonably available evidence, that he or she is not a national of a country with which he or she has a relevant

¹³⁵ Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 127 [82]. The *PAM3* continues:

This is because establishing whether an applicant is stateless as claimed is relevant to the determination of their identity, country of reference and circumstances which may be key factors in the assessment (for the purposes of s 36(2)(a) or 36(2)(aa) of the Act) of whether they are a person to whom Australia has protection obligations.

¹³⁶ See, eg, UNHCR, *Expert Meeting: The Concept of Stateless Persons under International Law — Summary Conclusions* (Prato, 28 May 2010) <<http://www.unhcr.org/4cb2fe326.pdf>> ('*Prato Conclusions*'); UNHCR, *Expert Meeting: Statelessness Determination Procedures and the Status of Stateless Persons — Summary Conclusions* (Geneva, 6–7 December 2010) <<http://www.unhcr.org/protection/statelessness/4d919a436/expert-meeting-statelessness-determination-procedures-status-stateless.html>> ('*Geneva Conclusions*'); UNHCR, *Handbook on Protection of Stateless Persons*, above n 20; 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).

¹³⁷ Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 128 [84.2].

¹³⁸ Note that concepts such as 'onus' or 'standard' of proof are generally inappropriate in the refugee context, since they are usually shared: see *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363, 375 [40], 376–7 [46], 383 [69] (Wilcox J). But see s 5AAA of the *Migration Act*, introduced in 2015.

¹³⁹ UNHCR, *Geneva Conclusions*, above n 136, 4 [13]. The Australian Government has recognised this in Onshore Protection Consultative Group, 'Statelessness: Extract of Issues Paper', above n 14. For comparative state practice see Batchelor, 'The 1954 Convention', above n 23, 40–2.

¹⁴⁰ UNHCR, *Prato Conclusions*, above n 136, 3 [13]. See generally UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 13–14 [27]–[29].

connection, then the burden should shift to Australia to prove that the individual *is* a national of a particular country.¹⁴¹

Second, *PAM3* appropriately states that:

decision-makers must consider all available information, including written claims, documentary evidence and oral evidence provided by the applicant, as well as country of origin information ... or any paper on CISNET [a departmental database] relating to the country where the applicant resided or cohort to which they belong, and they must not rely solely on a person's claims of being stateless.¹⁴²

However, *PAM3* suggests that a decision-maker 'should try to attain a level of satisfaction as to the identity of an applicant making claims of statelessness',¹⁴³ and, in particular, 'must assess an applicant's claims of statelessness against the laws of the country/countries of former habitual residence to determine whether the applicant *could be entitled to citizenship*'.¹⁴⁴ Even more concerning is the idea that a person 'might have an unexercised entitlement to *residence or citizenship* in another country [other than the country of former habitual residence]',¹⁴⁵ which could include a country to which the applicant has never been. This notion that a person 'could be entitled to citizenship'¹⁴⁶ is at odds with the clear view of the UNHCR that nationality 'is to be assessed as at the time of determination' and is not 'a predictive exercise'.¹⁴⁷ Hence, whether or not a person *could* be entitled to citizenship is arguably irrelevant to assessing his or her protection needs.¹⁴⁸ Furthermore, a mere 'entitlement

¹⁴¹ This contention draws on UNHCR, *Geneva Conclusions*, above n 136, 4 [13].

¹⁴² Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 127 [81].

¹⁴³ *Ibid* 129 [86.1].

¹⁴⁴ *Ibid* 129 [86.3] (emphasis added).

¹⁴⁵ *Ibid* 130 [87.1] (emphasis added).

¹⁴⁶ *Ibid* 129 [86.3].

¹⁴⁷ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 20 [50].

¹⁴⁸ The only exception in the context of the *Refugee Convention* is inchoate nationality, but this needs to be understood in a very narrow sense: see Hathaway and Foster, above n 7, 57–64. The *PAM3* is a bit confused on this point. It attempts to distinguish between an enforceable versus discretionary right to citizenship, but then notes that 'it may be possible to encourage the applicant to apply for that citizenship if they are found not to engage Australia's protection obligations and are on a removal pathway': Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 130 [87.1].

to resident status¹⁴⁹ does not obviate Australia's obligations under either the *1954 Convention* or the *Refugee Convention*.¹⁵⁰

A third issue relates to the possession of documentation by the applicant. As detailed above, *PAM3* states that decision-makers must consider 'all available information'.¹⁵¹ However, there is no discussion of the challenges an applicant may face in providing documentary evidence, such as identity and travel documentation, or oral evidence. On account of not being recognised as a national by any state, stateless persons generally do not have documentation as to their citizenship status. This may prevent them from obtaining other forms of identity documentation as well.¹⁵²

For instance, there are many factors that may undermine a stateless applicant's ability to have his or her birth registered. As such, there may be legitimate reasons why a stateless person is unable to provide either documentary or oral evidence as to the date, place and registration of his or her birth. The UN Children's Fund ('UNICEF') estimated in 2013 that 'the births of nearly 230 million children under age five [around one in three] have never been recorded'.¹⁵³ In situations of conflict, protracted displacement, humanitarian emergencies and post-conflict transition, birth registration rates are significantly lower or even non-existent.¹⁵⁴ They are particularly low among refugee and asylum seeker populations,¹⁵⁵ mainly because parents are often 'unable to approach the consular authorities of their country of nationality in order to register or claim documents for the child', and 'the host State may also be unwilling to provide for birth registration'.¹⁵⁶ Additionally, in some countries there are significant barriers to the immediate and effective registra-

¹⁴⁹ Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 130 [87.1].

¹⁵⁰ They each contain equivalents of art 1(E) of the *Refugee Convention* which require de facto nationality, not just residence. But see ss 36(3)–(7) of the *Migration Act*, which requires a decision-maker to consider whether an applicant has taken all possible steps to exercise a right to enter and reside in a safe third country. If the applicant has not, this provides a basis for refusal of a protection visa.

¹⁵¹ Department of Immigration and Border Protection (Cth), *PAM3*, above n 93, 127 [81].

¹⁵² 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>; UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 16 [38], 34 [90].

¹⁵³ UN Children's Fund, *Every Child's Birth Right: Inequities and Trends in Birth Registration* (2013) 14.

¹⁵⁴ UNICEF, *Birth Registration and Armed Conflict* (2007) 7.

¹⁵⁵ UNHCR, 'Birth Registration' (Child Protection Issue Brief, UNHCR, August 2013).

¹⁵⁶ UNHCR, *Self-Study Module on Statelessness*, above n 40, 26.

tion of orphans and abandoned children.¹⁵⁷ Late birth registration is frequently prohibitively expensive for vulnerable groups, and in any case inaccessible given the documentation required.¹⁵⁸

For these reasons, the UNHCR's *Handbook on Protection of Stateless Persons* advises that '[s]tatelessness determination authorities need to take this [inability to obtain documentary evidence] into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.'¹⁵⁹

It also explains why it is not uncommon for stateless persons to acquire false documentation and use multiple identities as a survival mechanism and a pathway for seeking asylum.¹⁶⁰ This is why the passage in 2015 of the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) was of particular concern. The Act amended s 91W of the *Migration Act* and added a new s 91WA. The effect was that even if an asylum seeker were found to be in need of protection pursuant to s 36 of the *Migration Act*:

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

¹⁵⁷ UNICEF, 'Birth Registration: Right from the Start' (2002) 9 *Innocenti Digest* 1, 11.

¹⁵⁸ UNICEF, *A Passport to Protection: A Guide to Birth Registration Programming* (2013) 25, 60, 68.

¹⁵⁹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 34 [90].

¹⁶⁰ See generally Equal Rights Trust, above n 13.

- (b) either:
- (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.¹⁶¹

The statement of compatibility with human rights that accompanied this amendment acknowledged that '[t]he Government accepts that it may not be possible, in certain circumstances, for applicants to provide such documents, for instance during times of conflict in their home country or where they are stateless.'¹⁶² However, this is not reflected explicitly in the legislation and there is no guarantee that statelessness will be understood as a 'reasonable explanation'¹⁶³ for the above purposes. Indeed, analysis of the limited case law on s 91WA to date — none of which has involved stateless applicants — suggests that decision-makers do not readily accept that an explanation on the part of an applicant is 'reasonable' for the purposes of the s 91WA(2)(a) exception.¹⁶⁴

Among decision-makers conducting merits review, there appears to be a lack of consistency in the methods used to assess statelessness. While some decision-makers only consider the applicant's identity or travel documentation¹⁶⁵ or the applicant's evidence, others consider the applicant's evidence

¹⁶¹ *Migration Act* ss 91WA(1)–(2).

¹⁶² Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014 (Cth), Attachment A, 6.

¹⁶³ *Migration Act* s 91WA(2)(a).

¹⁶⁴ Section 91WA of the *Migration Act* applies to all ongoing, 'live' applications for refugee and complementary protection as assessed after 18 April 2015, irrespective of when the application for protection was lodged: *1409422* [2015] RRTA 233 (29 April 2015) [14] (Member Mackinnon). In the published decisions (up until and including 14 March 2016) in which the applicants' reasoning for providing a bogus document was not found to be 'reasonable', the Tribunal relied on assumptions as to what the applicant should have known about the visa application process in the relevant country (*1417964 (Refugee)* [2015] AATA 3959 (16 December 2015) [36]–[43] (Member Cranwell)) and assessments as to the applicants' credibility, generally (*1501366 (Refugee)* [2015] AATA 3338 (18 August 2015) [43]–[52] (Member Kennedy); *1409771 (Refugee)* [2015] AATA 3234 (23 July 2015) [53] (Member Jolliffe)). In only one of the decisions was the applicant's 'fear of persecution and desire to seek asylum' found to be 'a reasonable explanation for entering Australia on a bogus document': *1409422* [2015] RRTA 233 (29 April 2015) [14] (Member Mackinnon). However, it must be noted that the applicant in *1409422* also provided 'documentary evidence' of their 'identity, nationality or citizenship', and such evidence contributed to the decision-maker's overall finding that the applicant had provided a 'reasonable explanation': at [14].

¹⁶⁵ *1113737* [2012] RRTA 958 (25 October 2012).

together with country information,¹⁶⁶ the applicant's evidence together with identity documentation,¹⁶⁷ or all three.¹⁶⁸

Very few of the decisions we considered examined the nationality laws of the countries with which the applicant had links.¹⁶⁹ A failure to engage in such analysis makes it impossible to effectively assess whether or not the applicant is stateless. In some decisions, the applicant was found to be stateless without any reference to the applicant's evidence, country information or the nationality laws of relevant countries or otherwise.¹⁷⁰ Perhaps of most concern was that some decision-makers did not even consider or make a finding with regard to the applicant's claim to be stateless.¹⁷¹

In the majority of decisions, statelessness assessments were linked to identity assessments. Some decision-makers were reluctant to examine independently whether the applicant was stateless where there were doubts about the applicant's credibility,¹⁷² and/or there was insufficient information to support the applicant's claim.¹⁷³ Importantly, some decision-makers accepted that the applicant's statelessness forced him or her to travel on fraudulent documents.¹⁷⁴ Yet, in other decisions, where applicants claimed that the identity documents in their possession were false, their evidence was found not to be credible.¹⁷⁵ Instead, the documents were relied on by the decision-maker as evidence of the applicant's identity.¹⁷⁶ These inconsistencies in

¹⁶⁶ 1215874 [2013] RRTA 585 (26 August 2013); 1317610 [2014] RRTA 472 (28 May 2014).

¹⁶⁷ 1106804 [2011] RRTA 1046 (21 December 2011); 1113683 [2012] RRTA 611 (9 August 2012).

¹⁶⁸ 1007661 [2010] RRTA 1063 (25 November 2010); 0805551 [2009] RRTA 24 (15 January 2009); 1310456 [2014] RRTA 881 (17 December 2014).

¹⁶⁹ Decisions engaging with these nationality laws include: 1311115 [2013] RRTA 822 (25 November 2013); 0802146 [2008] RRTA 274 (23 July 2008); 1111306 [2012] RRTA 265 (23 April 2012); 1102027 [2011] RRTA 996 (17 November 2011); N04/49992 [2005] RRTA 63 (29 March 2005).

¹⁷⁰ See 1211453 [2013] RRTA 345 (13 May 2013).

¹⁷¹ N05/52051 [2005] RRTA 257 (4 October 2005).

¹⁷² 1402190 [2014] RRTA 602 (28 July 2014) [59]–[64] (Member Shanahan); *SZSSV v Minister for Immigration* [2013] FCCA 1539 (13 September 2013) [13], summarising RRT decision below; *SZQZK v Minister for Immigration and Citizenship* [2012] FMCA 490 (8 June 2012) [22]–[28], summarising the decision below of the independent merits reviewer.

¹⁷³ 1311126 [2014] RRTA 173 (3 March 2014) [41] (Member Irish).

¹⁷⁴ 1107430 [2011] RRTA 790 (8 September 2011) [32] (Member Jacovides); 1006929 [2010] RRTA 841 (27 September 2010) [29]–[30] (Member Jacovides).

¹⁷⁵ 1303526 [2013] RRTA 815 (19 November 2013) [45]–[46] (Member Kamand).

¹⁷⁶ *Ibid* [10].

approach highlight the problems that occur when there is no clear legislative basis for assessing statelessness.

B *How is the 'Country of Former Habitual Residence' Determined?*

Given that a stateless person is not a national of any country, the relevant country of reference for assessing well-founded fear of being persecuted is the 'country of his or her former habitual residence'. This is incorporated in the definition of 'receiving country' in s 5 of the *Migration Act*.¹⁷⁷

Hathaway and Foster suggest that a country of former habitual residence:

is an international legal term of art, assessed on the basis of a wide-ranging inquiry that would ordinarily include consideration of such factors as whether the applicant was lawfully admitted to, and entitled to leave and return to, the country; lived there for a significant period of time; and made it the center of her interests.¹⁷⁸

In the decisions examined for the purposes of the present analysis, some decision-makers considered factors such as the applicant's place of birth; the time spent by the applicant in the 'receiving country'; identity and travel documentation held by the applicant; and the applicant's links to the 'receiving country' with regard to education and employment in determining the country of former habitual residence.¹⁷⁹ In others, the decision-maker simply accepted the applicant's contention,¹⁸⁰ or provided no reasoning at all or made no finding about the applicant's country of former habitual residence.¹⁸¹

The following Table summarises the places found to be 'countries of former habitual residence' in the decisions we considered.

¹⁷⁷ The definition notes that for the purposes of the term 'receiving country' in the Act, 'if the non-citizen has no country of nationality — [it means] a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country': *Migration Act* s 5 (definition of 'receiving country' para (b)).

¹⁷⁸ Hathaway and Foster, above n 7, 75.

¹⁷⁹ *1106804* [2011] RRTA 1046 (21 December 2011); *1005911* [2010] RRTA 923 (20 October 2010); *1107430* [2011] RRTA 790 (8 September 2011); *1310456* [2014] RRTA 881 (17 December 2014); *1104223* [2011] RRTA 725 (25 August 2011); *1317610* [2014] RRTA 472 (28 May 2014); *1102027* [2011] RRTA 996 (17 November 2011); *0802865* [2008] RRTA 307 (20 August 2008).

¹⁸⁰ *1006929* [2010] RRTA 841 (27 September 2010); *1100132* [2011] RRTA 246 (29 March 2011).

¹⁸¹ *N05/51687* [2005] RRTA 179 (31 August 2005); *1303526* [2013] RRTA 815 (19 November 2013).

Table 5: Ethnicities and Receiving Countries of Former Habitual Residence

| Ethnicity | 'Receiving country' |
|-------------|--|
| Faili Kurd | Iraq and Iran |
| Palestinian | 'West Bank/Gaza', Israel and 'Occupied Territories', 'Palestine Territories', Syria, Qatar, Jordan, United Arab Emirates and Lebanon |
| Rohingya | Myanmar |
| Bidoon | Iraq and Kuwait |

Hathaway and Foster suggest that:

Insofar as a stateless person has more than one country of former habitual residence, it suffices for her to meet the well-founded fear test in relation to one of those states, and to show that she is not able to return to, and receive protection in, any other country of former habitual residence.¹⁸²

However, in the decisions we examined where the applicant potentially had more than one country of former habitual residence, the decision-maker did not always explore this.¹⁸³ In one decision, the decision-maker recognised the possibility that a stateless person could have more than one country of former habitual residence, but found that the relevant country was the one with which the applicant's relationship was 'more broadly comparable to that between a citizen and his or her country of nationality'.¹⁸⁴

¹⁸² Hathaway and Foster, above n 7, 75. See also UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 11 [18].

¹⁸³ *I311115* [2013] RRTA 822 (25 November 2013); *I113737* [2012] RRTA 958 (25 October 2012); *MZZQN v Minister for Immigration and Border Protection* [2014] FCCA 2886 (10 December 2014).

¹⁸⁴ *I215874* [2013] RRTA 585 (26 August 2013) [104] (Member Fordham).

C *Statelessness and Well-Founded Fear of Persecution*

As discussed above, while statelessness per se is insufficient to support a claim for refugee protection, there are a number of ways in which the absence of nationality can give rise to a well-founded fear of being persecuted.¹⁸⁵

One fascinating and, until recently, under-explored question is whether denial or deprivation of nationality on *Refugee Convention* grounds is *itself* persecutory, or whether it is only where the *consequences* of a lack of nationality are sufficiently serious that the persecution standard is attained.¹⁸⁶ Consistent with the global trend, there is very little case law on this question in Australia, and that which exists yields contradictory results.

On one hand, the Federal Court has recognised that ‘the denial of citizenship by reason of nationality, race, religion or membership of a social group may constitute persecution.’¹⁸⁷

Sometimes the decision-maker does not distinguish between the deprivation of nationality itself, and its consequences. For example, in a decision involving the application for a protection visa by a stateless former resident of Bhutan, the RRT found that:

the applicant’s exclusion from the right to Bhutanese citizenship and the right to return to the country where his family had lived for three generations, as well as all the disadvantages that emanated from the depravation [sic] of these rights amount to persecution for the *Convention* reason of ethnicity.¹⁸⁸

¹⁸⁵ For a brief overview see Kate Darling, ‘Protection of Stateless Persons in International Asylum and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 742.

¹⁸⁶ The question is canvassed in *Refugee Status*, UN Doc PPLA/2014/01. See also Maryellen Fullerton, ‘The Intersection of Statelessness and Refugee Protection in US Asylum Policy’ (2014) 2 *Journal on Migration and Human Security* 144.

¹⁸⁷ *BZADW v Minister for Immigration and Border Protection* [2014] FCA 541 (26 May 2014) [21] (Dowsett J). This view is supported by the German Federal Administrative Court, focusing on the intensity of the interference and the resulting exclusion from the rights of citizenship: Bundesverwaltungsgericht [German Federal Administrative Court], BVerwG 10 C 50.07, 26 February 2009, [18]. Specifically, the Court held that (emphasis added) (Minh-Quan Nguyen trans):

An act of persecution by the state need not consist of interferences with life, limb or freedom. Violations of other proprietary rights and liberties may also, according to the circumstances of the case, correspond to persecution. *Persecution may also be seen, as a matter of principle, from the intensity of the interference where the state divests a citizen of the essential rights of citizenship and thereby excludes them from the general peaceful order of the unified state.*

¹⁸⁸ 071626084 [2007] RRTA 304 (21 November 2007) (Member Roushan).

On the other hand, there are cases in which the Federal Court has rejected the notion that arbitrary or discriminatory deprivation of nationality is sufficient to constitute persecution at all. For example, in *SZTFX v Minister for Immigration and Border Protection* the Court held that ‘in the context of refusal of nationality, it is not that refusal which could be said to be persecutory but rather the conduct which might flow from it.’¹⁸⁹ This issue has not been resolved and reflects a similar divergence of approaches on this issue in jurisprudence globally.¹⁹⁰

Given the widely accepted notion that ‘being persecuted’ can be constituted by a sustained or systemic violation of human rights,¹⁹¹ and the fact that arbitrary deprivation of nationality, including on prohibited grounds, is a clear human rights violation,¹⁹² the better view is that:

short of engineering one’s deprivation of nationality for personal convenience, all deprivation of nationality should lead to a finding of persecution because ‘nationality’ is and continues to be the gateway for the exercise of most basic human rights. Where deprivation of nationality is found to be discriminatory and/or arbitrary, this should lead to finding of persecution for a *Convention* ground.¹⁹³

This issue is ripe for further curial analysis, and the reasoning of the United States (‘US’) Court of Appeals for the 6th Circuit is instructive in indicating the scope for a more sophisticated approach. In *Stserba v Holder*,¹⁹⁴ that Court considered the asylum claim of a woman of Russian ethnicity whose Estonian

¹⁸⁹ (2015) 146 ALD 172, 179 [40] (McKerracher J), quoting *SZTFX v Minister for Immigration* [2014] FCCA 361 (18 February 2014) [21] (Judge Cameron).

¹⁹⁰ See H el ene Lambert, ‘Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status’ (2015) 64 *International and Comparative Law Quarterly* 1.

¹⁹¹ Hathaway and Foster, above n 7, 185.

¹⁹² The UN Secretary-General’s report to the Human Rights Council in 2009 describes this as a rule of international law: Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 13th sess, Agenda Item 3, UN Doc A/HRC/13/34 (14 December 2009) 5–6 [19]–[22]. The European Court of Human Rights regards it as a breach of art 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010): *Kuri c v Slovenia* [2012] IV Eur Court HR 1, 66–72 [339]–[362].

¹⁹³ *Refugee Status*, UN Doc PPLA/2014/01, 56. Lambert, who authored this document, formed her view by drawing on best practice from the limited international jurisprudence on this issue.

¹⁹⁴ 646 F 3d 964 (6th Cir, 2011).

citizenship had been revoked, rendering her stateless. Quoting the US Supreme Court, the Court stated that '[t]he essence of denationalization is "the total destruction of the individual's status in organized society"',¹⁹⁵ and held that 'because denationalization that results in statelessness is an extreme sanction, denationalization may be per se persecution when it occurs on account of a protected status such as ethnicity.'¹⁹⁶

Nevertheless, an examination of jurisprudence in Australia, Belgium, Germany, New Zealand, Spain and the United Kingdom yields the conclusion that the *practical consequences* of deprivation of nationality are generally key to the assessment whether that act amounts to persecution (rather than mere discrimination).¹⁹⁷ Therefore, 'courts tend to focus on the effects or consequences of statelessness on the person (eg, the denial of human rights through discriminatory acts) as these are easier to measure in terms of severity.'¹⁹⁸ In line with such jurisprudence,¹⁹⁹ some Australian decisions have accepted that the discrimination faced by an applicant as a result of being stateless in the country of former habitual residence was sufficient to amount to persecution.²⁰⁰ In other cases, however, the discrimination faced by stateless persons in the country of former habitual residence *together with* the cumulative effect of the applicant's individual circumstances were considered to constitute persecution.²⁰¹

¹⁹⁵ *Stserba v Holder*, 646 F 3d 964, 974 (Judge Moore) (6th Cir, 2011), quoting *Trop v Dulles*, 356 US 86, 101 (Warren CJ) (1958). There, Warren CJ of the US Supreme Court described denationalisation as 'a form of punishment more primitive than torture'.

¹⁹⁶ *Stserba v Holder*, 646 F 3d 964, 974 (Judge Moore) (6th Cir, 2011).

¹⁹⁷ Lambert, 'Comparative Perspectives', above n 190, 51–2.

¹⁹⁸ *Ibid* 56.

¹⁹⁹ See, eg, *EB (Ethiopia) v Secretary of State for the Home Department* [2009] QB 1, 20 [70] (Longmore LJ), in which the England and Wales Court of Appeal held that a discriminatory removal of identity documents by the state, 'with the aim of making it difficult for [the appellant] in future to prove her nationality', itself constituted persecution. As Lambert states, 'the refusal of entry on ground (of lack of) nationality has been found to amount to persecution based on the violation of the right to leave and re-enter one's country, linked closely to the arbitrary deprivation of nationality': *ibid* 33.

²⁰⁰ *1113737* [2012] RRTA 958 (25 October 2012) [100]–[102] (Member Cameron); *1108826* [2011] RRTA 1026 (5 December 2011) [62]–[63] (Member Raif); *1005911* [2010] RRTA 923 (20 October 2010) [118] (Member McIntosh); *0805551* [2009] RRTA 24 (15 January 2009) [60] (Member Roushan); *0802865* [2008] RRTA 307 (20 August 2008) [55]–[57] (Member Roushan); *N05/50543* [2005] RRTA 200 (28 July 2005); *N04/49992* [2005] RRTA 63 (29 March 2005).

²⁰¹ *1215874* [2013] RRTA 585 (26 August 2013) [141], [149] (Member Fordham); *1105010* [2011] RRTA 1066 (21 December 2011) [71], [75] (Member Mathlin); *1000094* [2010] RRTA 277 (16 April 2010) [155]–[156] (Member McIntosh); *0905729* [2009] RRTA 981

Some decision-makers have sensibly considered the extent to which the discrimination faced by the applicant is linked to both the applicant's ethnicity and statelessness,²⁰² enabling a more nuanced understanding of the link between the discrimination faced by the applicant and the harm feared.²⁰³

Persecution under the *Refugee Convention* must also relate to at least one of the five nominated grounds. In this respect, Australian decisions in which stateless persons have been found to be refugees on account of circumstances related to their statelessness (either solely or cumulatively) have relied upon:

- 1 Membership of a particular social group (eg, Bidoon in Iraq without documentation);²⁰⁴
- 2 Imputed political opinion (eg, young Palestinian male in Lebanon);²⁰⁵
- 3 Nationality (eg, Palestinian: attribution of a nationality for the purpose of self-identification, or identification by other groups, as a motivation for persecution);²⁰⁶
- 4 Race (ethnicity) (eg, stateless Rohingya²⁰⁷ or Faili Kurd).²⁰⁸

There are also decisions in which protection has been refused, such as where the applicant's personal circumstances meant that the discrimination faced in the country of former habitual residence as a stateless person was not considered to amount to persecution.²⁰⁹ Protection has also been denied to applicants who were found to be stateless, but whose claims were considered

(28 September 2009) [80]–[82] (Member Roushan); *V03/15685* [2004] RRTA 214 (12 March 2004); cf the RRT's reasoning recounted in *SZSVT v Minister for Immigration* [2014] FCCA 768 (17 April 2014) [6]–[25] (Judge Barnes).

²⁰² *N05/51687* [2005] RRTA 179 (31 August 2005); *1215874* [2013] RRTA 585 (26 August 2013); *MZZMA v Minister for Immigration and Border Protection* [2015] FCCA 125 (23 January 2015).

²⁰³ Cf *SZTFX v Minister for Immigration* [2014] FCCA 361 (18 February 2014) [20]–[21] (Judge Cameron).

²⁰⁴ *1004584* [2010] RRTA 797 (17 September 2010) [73], [79]–[80] (Member Roushan).

²⁰⁵ *1101828* [2011] RRTA 411 (30 May 2011) [55], [66]–[67] (Member Roushan).

²⁰⁶ *0909179* [2010] RRTA 200 (4 March 2010) [62]–[63] (Member Mathlin).

²⁰⁷ *1107430* [2011] RRTA 790 (8 September 2011) [33], [35], [38] (Member Jacovides).

²⁰⁸ *WZAPN v Minister for Immigration and Border Protection* (2014) 229 FCR 477, 479 [5] (North J).

²⁰⁹ *1104332* [2011] RRTA 876 (21 October 2011) [95] (Member Roushan); *1100313* [2011] RRTA 247 (1 April 2011) [48] (Member Roushan); *0904796* [2010] RRTA 1005 (15 November 2010) [73] (Member Boddison); *BZADW v Minister for Immigration and Border Protection* [2014] FCA 541 (26 May 2014) [6], [32] (Dowsett J).

to lack credibility as to the harm feared in the country of former habitual residence.²¹⁰

In sum, while the refugee protection regime is currently an important source of protection for stateless persons in Australia, significant gaps remain for two key reasons. The first is that there are inherent limitations in the terms of the refugee definition itself. The second is that, to date, there has been a lack of harmonisation between the interpretation of the refugee definition, on the one hand, and the sophistication and evolution in the international community's understanding of the causes and consequences of statelessness as a human rights issue, on the other.

D Complementary Protection

Australia's complementary protection regime commenced on 24 March 2012,²¹¹ yet between that date and 21 August 2015 (the cut-off point for our study), there were no decisions in which an applicant was granted complementary protection for reasons of statelessness. Since many of the publicly available tribunal decisions found that the stateless asylum applicants were refugees, the complementary protection criteria were not considered.²¹² However, as Lambert has noted, human rights law may provide a different lens for assessing the risk of harm if a person is removed. For example, the UK Asylum and Immigration Tribunal has made clear that under human rights law, 'the issue of whether there would be serious obstacles to re-admission must remain central to the question of whether there is a real risk of serious harm.'²¹³

Of the remaining reported decisions, the applicant was either found not to be credible,²¹⁴ or the harm feared was considered of insufficient gravity either to meet the threshold of persecution (required for refugee status pursuant to s

²¹⁰ 1101896 [2011] RRTA 401 (30 May 2011) [91] (Member Roushan).

²¹¹ For details, see Jane McAdam and Fiona Chong, 'Complementary Protection in Australia Two Years On: An Emerging Human Rights Jurisprudence' (2014) 42 *Federal Law Review* 441.

²¹² This follows from the wording of s 36(2)(aa) of the *Migration Act*.

²¹³ *YL Eritrea* [2003] UKIAT 00016 (30 June 2003) [64] (Vice President Storey), quoted in *Refugee Status*, UN Doc PPLA/2014/01, 39.

²¹⁴ 1311126 [2014] RRTA 173 (3 March 2014) [38], [43] (Member Irish); 1319591 [2014] RRTA 619 (31 July 2014) [54] (Member Irish); 1402190 [2014] RRTA 602 (28 July 2014) [47]–[51] (Member Shanahan); 1212334 [2013] RRTA 566 (22 August 2013) [42]–[44] (Member Shanahan).

36(2)(a)) or ‘significant harm’ (required for complementary protection pursuant to s 36(2)(aa)) in the *Migration Act*.²¹⁵

The Department of Immigration and Border Protection’s report on asylum trends from 2012–13 states that seven stateless applicants (who were classified as IMAs) were granted protection on complementary protection grounds (either by the initial departmental decision-maker or following review).²¹⁶ According to the same report, no stateless applicants who arrived by plane (classified as non-IMAs) during that period were granted complementary protection.²¹⁷

This indicates that, while the complementary protection regime may operate as a vital safety net for a handful of applicants who are found to meet its criteria, it is far from an adequate basis of protection for stateless persons in need of international protection.

E Ministerial Intervention: Sections 351, 417 and 501J of the Migration Act

If a stateless applicant does not satisfy the requirements of s 36 of the *Migration Act* for protection, the Minister retains a personal, non-compellable and non-reviewable discretion to grant the applicant a visa where he or she deems it to be in the public interest. Thus, pursuant to ss 351, 417 and 501J, the Minister can substitute a negative decision by the tribunal with one that favours the applicant.

The term ‘public interest’ is not defined in the *Migration Act*.²¹⁸ However, the Department’s website gives seven examples as guidance on ‘the types of unique or exceptional circumstances [the Minister] wants us to refer to him’

²¹⁵ 1303526 [2013] RRTA 815 (19 November 2013) [50]–[53] (Member Kamand); 1218580 [2013] RRTA 279 (2 April 2013) [66]–[76] (Member Leehy). ‘Persecution’ and ‘significant harm’ are not interchangeable, and require different analysis: see McAdam and Chong, above n 211, 447–56. Note that while New Zealand jurisprudence states that ‘cruel, inhuman or degrading treatment’ must meet the same threshold as ‘persecution’, this should not be mistaken as setting an excessively high bar. Rather, New Zealand jurisprudence proceeds on the basis that ‘persecution’ already encompasses ‘cruel, inhuman or degrading treatment’: AC (*Syria*) [2011] NZIPT 800035 [77]–[80] (Member Burson).

²¹⁶ Department of Immigration and Border Protection (Cth), *Asylum Trends*, above n 81, 32.

²¹⁷ *Ibid.*

²¹⁸ For judicial interpretation of the term see *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 350 [32], 353 [39] (French CJ, Crennan and Bell JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 648–9 [30]–[31] (French CJ and Kiefel J); *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

with regard to intervention requests.²¹⁹ The example most relevant to stateless applicants is that '[c]ircumstances outside your control mean you cannot go back to your country of citizenship or to the country you usually live in.'²²⁰ Others that could be relevant include '[c]ircumstances that bring Australia's obligations as a party to the *Convention on the Rights of the Child* into consideration' and '[c]ompassionate circumstances due to your age, health or your psychological condition that mean you would suffer irreparable harm and continuing hardship if you left Australia.'²²¹

While it is important that such a discretion remains in place to provide the possibility for protection of those in need, it is widely understood that such a discretionary regime is not an adequate basis on which to implement international obligations, such as those in the *1954 Convention*.²²² Indeed, a 2015 report written for the UNHCR in relation to Canada noted that 'it is difficult to foresee how Canada can meet its international human rights obligations towards stateless persons without establishing a determination procedure or mechanism that identifies them.'²²³

F *Detention or Removal Pending Bridging Visa*

Where stateless persons are found not to qualify as refugees or beneficiaries of complementary protection, or do not succeed in obtaining Ministerial intervention, then prolonged indefinite detention, to which the person may have already been subjected throughout the application process, can become a

²¹⁹ Department of Immigration and Border Protection (Cth), *What Type of Documents Do I Need to Support My Request for Ministerial Intervention?* <<https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-are-unique-or-exceptional-circumstances-what-type-of-documents-do-i-need-to-support-my-claims>>.

²²⁰ Ibid.

²²¹ Ibid.

²²² Jane McAdam, 'From Humanitarian Discretion to Complementary Protection — Reflections on the Emergence of Human Rights-Based Refugee Protection in Australia' (2011) 18 *Australian International Law Journal* 53, 71:

By its very nature, a discretionary power cannot fully comply with Australia's protection obligations under international law. Although international treaties do not prescribe the form in which States are to give effect to their obligations, it is apparent that any provision that contains a discretionary decision-making power is at odds with Australia's duty to respect the principle of *non-refoulement* under international human rights law.

²²³ Gregg Eraw, 'Compatibility of the *1954 Convention Relating to the Status of Stateless Persons* with Canada's Legal Framework and Its International Human Rights Obligations' (Report, UNHCR, 2015) 13.

long-term prospect. In *Al-Kateb v Godwin*,²²⁴ Mr Al-Kateb was unable to be released from detention because his claim for protection under the *Refugee Convention* had been rejected and, as a stateless Palestinian born in Kuwait, there was no visa category available to him, nor any country to which he could return or be returned.²²⁵ The High Court held, as a matter of statutory construction, that the *Migration Act* effectively authorised the indefinite detention of a person who was unlawfully present in Australia (that is, not in possession of a valid visa) and who could not be removed, even if that detention may not realistically come to an end. The majority found that this was not unconstitutional because, in its view, such detention was administrative, not punitive, in nature. There was considerable public outcry about the implications of this finding. After eventually being allowed to live in the community on a series of short-term bridging visas, in 2007 Mr Al-Kateb was granted a Permanent Visa following Ministerial intervention.²²⁶ However, the broader systemic problem remains: stateless persons who are unsuccessful in their asylum applications may be detained indefinitely because there is no country to which they can return or be returned. Yet detention of stateless persons on account of their statelessness is contrary to the prohibition on arbitrary detention in international law.²²⁷

²²⁴ (2004) 219 CLR 562. See also *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609.

²²⁵ Equal Rights Trust, above n 13, 124–5. See also David Marr, ‘Escape from a Life in Limbo’, *The Sydney Morning Herald* (online), 27 October 2007, <<http://www.smh.com.au/articles/2007/10/26/1192941339538.html>>.

²²⁶ Equal Rights Trust, above n 13, 127.

²²⁷ There is ample authority to support the position that the detention of asylum-seekers, refugees and stateless persons is rarely, if ever justified, at least beyond the minimum period required to undertake security and identity checks. See the views of the UN Human Rights Committee in the following cases: Human Rights Committee, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) (*‘FKAG v Australia’*); Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) (*‘MMM v Australia’*); Human Rights Committee, *Views: Communications Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Docs CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007) (*‘Shams v Australia’*); Human Rights Committee, *Views: Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) (*‘Shafiq v Australia’*); Human Rights Committee, *Views: Communication No 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006) (*‘D and E v Australia’*); Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) (*‘Bakhtiyari v Australia’*); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) (*‘Baban v Australia’*); Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13

While it is not possible to identify length of detention based on nationality in recent statistics, it is clear that without a dedicated visa pathway, stateless persons in Australia are at risk of very prolonged detention, as recognised by a 2012 Australian Human Rights Commission report.²²⁸ It reported that '[a]s at 15 May 2012, there were 555 people in closed [immigration] detention in Australia who identified as being stateless, 114 of whom had been detained for over 540 days.'²²⁹ A perusal of the Commonwealth and Immigration Ombudsman individual reports to Parliament in relation to non-citizens who have been in immigration detention for more than two years reveals many stateless persons being detained for prolonged periods, some for more than three years.²³⁰ This is exemplified by the recent case of *SZUNZ v Minister for Immigration and Border Protection*,²³¹ in which a stateless applicant had been in detention for over five years.

The Removal Pending Bridging Visa ('RPBV') (Bridging R, Class WR) was introduced following the High Court's decision in *Al-Kateb v Godwin*²³² in

November 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*'). See also UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, 59th sess, UN Doc E/CN.4/2003/8/Add.2 (24 October 2002) annex ('*Report of the Working Group on Arbitrary Detention on Its Visit to Australia (24 May–6 June 2002)*'). There are ample alternatives to detention: see Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UN Doc PPLA/2011/01.Rev.1 (April 2011); Cathryn Costello and Esra Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UN Doc PPLA/2013/02.Rev.1 (June 2013); International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (International Detention Coalition, revised ed, 2015) <<http://idcoalition.org/publication/view/there-are-alternatives-revised-edition/>>.

²²⁸ Australian Human Rights Commission, *Community Arrangements for Asylum Seekers, Refugees and Stateless Persons: Observations from Visits Conducted by the Australian Human Rights Commission from December 2011 to May 2012* (2012) 22.

²²⁹ *Ibid* 32, citing Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 21 May 2012, 97–8 (John Moorhouse, Deputy Secretary, Department of Immigration and Citizenship).

²³⁰ See, eg, Commonwealth and Immigration Ombudsman, *Report for Tabling in Parliament by the Commonwealth and Immigration Ombudsman under S 486O of the Migration Act 1958* (Second Report, following Report No 1377/13) <http://www.ombudsman.gov.au/_data/assets/pdf_file/0033/28698/1001208_report_to_parliament.pdf>. Mr X is awaiting the reassessment of his protection claims following the outcome of the judicial review of his independent merits review decision. Since the Ombudsman's previous report (1377/13), Mr X has remained in community detention.

²³¹ (2015) 230 FCR 272.

²³² (2004) 219 CLR 562.

order to enable the release of detainees ‘who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time.’²³³ It can be granted by the Minister pursuant to s 195A of the *Migration Act*.²³⁴ A detainee cannot initiate an application, but must be invited to do so by the Minister.²³⁵ All applicants must meet the relevant character and security requirements before it can be granted. Key concerns with the RPBV are that an applicant cannot initiate the application, the grant is discretionary (and practice has been inconsistent), the benefits available are less extensive than those available to holders of protection visas,²³⁶ and conditions are onerous.²³⁷ In short, this visa does not provide a secure legal status as required by the *1954 Convention* and hence does not provide a mechanism through which Australia’s international obligations to stateless persons can be fulfilled.

VI THE NEED FOR A STATELESSNESS STATUS DETERMINATION PROCEDURE IN AUSTRALIA

The analysis above of the inadequacy of domestic legal protection for stateless persons in Australia suggests that the introduction of a specific status determination procedure — supported by a legislative framework — is necessary.²³⁸ This would improve Australia’s ability to respect its obligations under the *1954 Convention*. In particular, it would meet two core objectives, namely, to provide a dedicated procedure to accurately and effectively identify stateless persons, and to confer an established status which accords basic

²³³ Department of Immigration and Border Protection (Cth), *Fact Sheet — Removal Pending Bridging Visa (RPBV)* <<https://www.border.gov.au/about/corporate/information/fact-sheets/85removalpending>>.

²³⁴ *Migration Act* s 195A empowers the Minister with the discretion to grant a visa to a person in immigration detention.

²³⁵ *Migration Regulations 1994* (Cth) reg 2.20A.

²³⁶ For example, ‘[t]he RPBV does not allow for sponsorship of family members or provide any right of re-entry if the visa holder departs Australia’: Department of Immigration and Border Protection (Cth), *Fact Sheet*, above n 233.

²³⁷ For details, see Sarah Joseph and Azadeh Dastyari, Submission No 12 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 [Provisions]*, 31 May 2011.

²³⁸ This Part draws heavily on Jane McAdam, ‘Position Paper on a Statelessness Determination Procedure for Australia’ (Position Paper, Refugee Council of Australia, 29 September 2011) <<https://www.refugeecouncil.org.au/r/se/l/120600-SSD.pdf>>.

rights and the potential for naturalisation to stateless persons in accordance with international law.

There are several reasons why a legislative procedure is necessary to implement these obligations. First, the introduction of a specific procedure would ensure fairness, transparency and clarity with respect to statelessness determinations.²³⁹ It is well understood that to be effective, international obligations must be enshrined in law, not left to discretionary or non-compellable processes.²⁴⁰ At present, as discussed above, there is a lack of clarity in both guidelines and case law regarding the core questions pertinent to the assessment of whether a person is stateless. The introduction of a specific protection regime for stateless persons would focus attention on the definition in art 1 of the *1954 Convention*, and encourage Australian decision-makers both to draw on, and contribute to, a nascent but developing body of international jurisprudence on its interpretation.²⁴¹ Second, as observed by the UNHCR, 'the identification of statelessness can help prevent statelessness by revealing the root causes and new trends in statelessness.'²⁴² Third, the introduction of a determination procedure would assist the Australian government to 'assess the size and profile' of stateless persons in Australia and thus the government services required to support them.²⁴³ Fourth, there is a pragmatic incentive: by identifying stateless persons at an early stage, costs could be saved on unnecessary detention²⁴⁴ (in terms of both the cost of detention itself, and that of the psychological counselling that is frequently necessary for people who have been in prolonged detention).²⁴⁵ This would

²³⁹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 28 [71]; UNHCR, *Geneva Conclusions*, above n 136, 2 [1].

²⁴⁰ See, eg, McAdam, 'From Humanitarian Discretion to Complementary Protection', above n 222.

²⁴¹ As Laura van Waas observes, the lack of widespread implementation of statelessness status determination procedures means that the 'stateless person' definition has not undergone the degree of 'progressive interpretation through doctrinal guidance and jurisprudence' as the refugee definition, although this 'is slowly changing': van Waas, 'The UN Statelessness Conventions', above n 22, 80.

²⁴² UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 6 [10].

²⁴³ *Ibid.*

²⁴⁴ See Gyulai, 'ENS Guidelines', above n 136, 6.

²⁴⁵ See, eg, Zachary Steel et al, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' (2006) 188 *British Journal of Psychiatry* 58; Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia' (2007) 44 *Trans-cultural Psychiatry* 359; Louise Newman, Nicholas Proctor and Michael Dudley, 'Seeking

simultaneously avoid violations of Australia's international obligations with respect to arbitrary detention.

As noted above, although the *1954 Convention* does not set out a procedure for determining who is stateless, a dedicated mechanism is crucial to identify who is owed the rights and entitlements provided for in that treaty, and thus ensure that states fulfil their protection obligations under that instrument.²⁴⁶ Indeed, the Inter-American Court of Human Rights has interpreted that treaty as necessarily involving a 'duty to identify ... as well as protect' stateless persons,²⁴⁷ also noting the importance of determining statelessness beyond the refugee context.²⁴⁸

In recent years, there has been a marked increase in the number of states that have adopted a domestic procedure for statelessness status determination.²⁴⁹ At least 15 states have some kind of process in place,²⁵⁰ while several others have signalled their intention to create one.²⁵¹ The UNHCR's goal is

Asylum in Australia: Immigration Detention, Human Rights and Mental Health Care' (2013) 21 *Australasian Psychiatry* 315.

²⁴⁶ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 6 [8]; UNHCR, *Geneva Conclusions*, above n 136, 2 [1]. See generally van Waas, *Nationality Matters*, above n 39, 423–32, who outlines a number of the issues subsequently adopted in various guidelines.

²⁴⁷ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Advisory Opinion)* [2014] Inter-American Court HR (ser A) No 21, 38 [94].

²⁴⁸ *Ibid* 39 [95]–[96].

²⁴⁹ For an overview see Gábor Gyulai, 'The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 116, 120–3.

²⁵⁰ See Gyulai, 'ENS Guidelines', above n 136, 7. These include France, Georgia, Hungary, Italy, Latvia, Mexico, Moldova, the Philippines, Slovakia, Spain, Turkey and the United Kingdom. In Finland, although there is no dedicated statelessness determination procedure, statelessness may be identified through the determination of citizenship procedure under s 36 of the *Nationality Act 2003* (Finland). That procedure was not specifically created to identify stateless persons, but the Supreme Administrative Court has interpreted the section broadly, emphasising the need to prevent statelessness and highlighting this as one of the procedure's purposes: UNHCR Regional Representation for Northern Europe, *Mapping Statelessness in Finland* (2014) 29, citing 30.4.2012/1046 KHO:2012:28 (Finland). Details on process and status are explained at 29–44. In addition, according to the Institute on Statelessness and Inclusion, *Statelessness: Monthly Bulletin* (online), April 2016 <http://www.institutesi.org/stateless_bulletin_2016-04.pdf>:

Both Costa Rica and Bulgaria introduced statelessness determination procedures (SDPs) into their legal systems [in April 2016]. On 7 April Costa Rica signed the relevant decree ... [t]wenty days later, on 27 April, Bulgaria's council of Ministers approved draft amendments, introducing the notion of 'stateless status' and a SDP.

²⁵¹ For example, at the 2011 Ministerial Intergovernmental Event, Belgium, Brazil, Peru, the United States and Uruguay pledged either to introduce or to encourage the introduction of

that 70 states will have a statelessness status determination procedure in place by 2024.²⁵²

While these models vary, ‘best practice’ guidance is provided by the UNHCR’s *Handbook on Protection of Stateless Persons*²⁵³ and the European Network on Statelessness’s Guidelines on Good Practices.²⁵⁴ These set out practical guidance that accords with international standards to assist states to create principled, effective domestic procedures that accord with the terms and objectives of the *1954 Convention*. Below we outline some key features that any Australian model should incorporate.

A Single Procedure

Statelessness status determination in Australia should form part of a single asylum procedure.²⁵⁵ Just as decision-makers first assess applicants against the

stateless determination procedures, while Austria undertook to review its implementation of the *1954 Convention* on the basis of UNHCR guidance: UNHCR, *Pledges 2011*, above n 14, 50–2 (Austria), 53–4 (Belgium), 56–7 (Brazil), 105 (Peru), 126–30 (United States), 131 (Uruguay). However, not all have done so to date. For instance, Belgium has a judicial process for determining statelessness, but despite its 2011 pledge has not created a legislative procedure: Office of the Commissioner General for Refugees and Stateless Persons (Belgium), *Stateless Persons* (2015) <<http://www.cgra.be/en/stateless-persons>>. Other countries that have recommended or are contemplating such a procedure include the Kyrgyz Republic, the Netherlands and the countries comprising the Economic Community of West African States: UNHCR Representation in the Kyrgyz Republic, *Concluding Statement of the Fifth High-Level Steering Meeting on the Prevention and Reduction of Statelessness in the Kyrgyz Republic* (27 November 2014) [6]; Government of the Netherlands, *Dutch Nationality: Statelessness* <<https://www.government.nl/topics/dutch-nationality/contents/statelessness>>; Economic Community of West African States/UNHCR, *Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness* (25 February 2015) [16]. Kosovo now has an SSD process, and there are ‘limited provision[s] existing in Slovakia, Switzerland and Turkey, as well as procedures in the pipeline in other countries such as Greece’: Chris Nash, ‘The EU’s Response to Statelessness — Where Next After Luxembourg?’ on *European Network on Statelessness Blog* (21 April 2016) <http://www.statelessness.eu/blog/eu-response-statelessness-where-next-after-luxembourg?mc_cid=50a79394da&mc_eid=f52f66b0dd#sthash.WHTwhDRd.dpuf>.

²⁵² See UNHCR, *Global Action Plan*, above n 35, 16.

²⁵³ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20.

²⁵⁴ Gyulai, ‘ENS Guidelines’, above n 136. See also UNHCR, *Geneva Conclusions*, above n 136; UNHCR, *Prato Conclusions*, above n 136. The significance of these developments in a relatively short space of time should not be underestimated. In 2008, van Waas lamented the absence of any guidelines for identifying stateless persons: van Waas, *Nationality Matters*, above n 39, 403–4.

²⁵⁵ ‘Statelessness determination has been delegated to the asylum authority in France, Moldova, Spain, the Philippines and the United Kingdom’: Gyulai, ‘ENS Guidelines’, above n 136, 9. See also Batchelor, ‘The *1954 Convention*’, above n 23, 38–40.

refugee criteria (s 36(2)(a) of the *Migration Act*), and then (if found not to be a refugee) against the complementary protection grounds (s 36(2)(aa)), the final step (if the person is neither a refugee nor found to be in need of complementary protection) would be to assess the claim against the statelessness criteria. This preserves the primacy of Australia's obligations under the *Refugee Convention*, and also ensures that a stateless person who fears persecution or other serious harm is not brought to the attention of the authorities of his or her government through investigations into his or her nationality.²⁵⁶ Such a process would provide a streamlined, efficient and workable means of assessing whether a person is stateless, and would not require the creation of any new institutional machinery. It would also build on the existing relevant expertise and knowledge of asylum decision-makers.²⁵⁷

B Access

Any individual in a state's territory should have access to a statelessness status determination procedure, regardless of whether he or she is 'lawfully present'.²⁵⁸ Indeed, in light of the difficulties often experienced by stateless persons in obtaining appropriate entry documentation, such a requirement would be particularly burdensome.²⁵⁹

²⁵⁶ On the need to be cautious in alerting third states of persecution claims see UNHCR, *Prato Conclusions*, above n 136, 3 [12]. An applicant should not be precluded from electing to have his or her claim assessed solely on the statelessness ground, however.

²⁵⁷ UNHCR, *Geneva Conclusions*, above n 136, 3 [6]. See UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 27–8 [62]–[67] for more detailed guidance.

²⁵⁸ Most countries with statelessness status determination procedures do not require applicants to be lawfully present in the country's territory to lodge a claim, and there is nothing in the *1954 Convention* that suggests lawful presence should be a precondition for doing so: Gyulai, 'ENS Guidelines', above n 136, 14. Furthermore, art 31(1) of the *1954 Convention* provides that states may 'not expel a stateless person lawfully in their territory save on grounds of national security or public order.' As art 31(2) stipulates, such expulsion is only permissible 'in pursuance of a decision reached in accordance with due process of law.' See generally UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 28 [68]–[70].

²⁵⁹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 28 [69]. Hungary imposed a lawful stay requirement until 2015, when the Constitutional Court declared it invalid because of inconsistency with international law: Hungarian Helsinki Committee, European Network on Statelessness, and Institute on Statelessness and Inclusion, Joint Submission to the Human Rights Council, *25th Session of the Universal Periodic Review: Hungary*, 21 September 2015, [27].

There is no basis in the *1954 Convention* for setting time limits for individuals to claim protection as a stateless person.²⁶⁰ Further, like refugee and complementary protection claims, stateless status determinations should be subject to independent merits and judicial review.²⁶¹ Other procedural safeguards should include access to information (in various languages) about eligibility criteria, the procedure and possible outcomes; the right to an interview with a decision-maker; assistance with preparing and presenting applications, including access to legal assistance and interpreters/translators; the right to confidentiality and data protection; and written reasons for decisions, communicated within a reasonable time.²⁶² Individuals should not be removed prior to a final determination (including appeals).²⁶³

C Evidentiary Requirements

In light of the challenges many individuals face in demonstrating that they meet the 'stateless person' definition, including access to evidence and documentation, applicants should not bear the sole responsibility for establishing the relevant facts.²⁶⁴ Rather, this burden should be shared by the applicant and the decision-making authority.²⁶⁵ That authority must identify which authorities in the relevant third state are competent to establish nationality,²⁶⁶ and the weight to be attached to the response or lack of response from the state in question.²⁶⁷ For instance, a state may not feel any accountability for indicating that a person does *not* have a bond of nationality, and a refusal to acknowledge that someone is a national might itself be evidence that the person is not.²⁶⁸ Decision-makers must consider not only the nationality law of a given state, but also the practice in that state with

²⁶⁰ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 28 [70]. France, Georgia, Hungary, Italy, Latvia, Mexico, Moldova, the Philippines, Slovakia, Turkey and the United Kingdom do not set time limits for individuals to claim protection as stateless individuals: Gyulai, 'ENS Guidelines', above n 136, 14.

²⁶¹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 29–30 [73]–[74], 30 [76].

²⁶² *Ibid* 27–8 [66], 28–9 [71], 29–30 [73]–[75]; Batchelor, 'The 1954 Convention', above n 23, 42.

²⁶³ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 29 [72].

²⁶⁴ *Ibid* 34–6 [87]–[94]; UNHCR, *Geneva Conclusions*, above n 136, 4 [13]. The Australian government recognised this in Onshore Protection Consultative Group, 'Statelessness: Extract of Issues Paper', above n 14, cited in McAdam, 'Position Paper', above n 238, 6 [26].

²⁶⁵ See, eg, the practice in the Philippines: Gyulai, 'ENS Guidelines', above n 136, 26.

²⁶⁶ UNHCR, *Prato Conclusions*, above n 136, 3 [13].

²⁶⁷ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 36 [98], 33 [86].

²⁶⁸ Batchelor, 'The 1954 Convention', above n 23, 37.

respect to conferral of nationality.²⁶⁹ As noted above, requests for information from a third state should only occur *after* it has been determined that a person is not at risk of persecution or other serious harm.²⁷⁰

Given the practical difficulties of an applicant being able to *prove* that he or she is stateless, and in light of the protection-oriented objective of the procedure (notably, the risk if a claim is incorrectly rejected), the UNHCR recommends that ‘a finding of statelessness would be warranted where it is established to a “reasonable degree” that an individual is not considered as a national by any State under the operation of its law.’²⁷¹

Since it would be virtually impossible for an applicant to demonstrate that none of the world’s 200 states considers him or her to be a national, it would only be necessary to consider states with which he or she has a relevant link (for example, birth, descent, marriage or habitual residence).²⁷² As Batchelor notes, ‘[p]roving statelessness is like establishing a negative. The individual must demonstrate something that is *not* there.’²⁷³ The authors concur with McAdam’s contention that:

where an individual can show, on the basis of all reasonably available evidence, that he or she is not a national of a particular country, then the burden should shift to Australia to prove that the individual *is* a national of a particular country.²⁷⁴

Relevant evidence in this context includes evidence relating to the applicant’s personal circumstances, and evidence concerning the laws and other circumstances in the country in question.²⁷⁵

²⁶⁹ UNHCR, *Geneva Conclusions*, above n 136, 5 [16].

²⁷⁰ *Ibid* 5 [14], 6–7 [26]–[30]. For details of good practices in the Philippines, Georgia and the United Kingdom see Gyulai, ‘ENS Guidelines’, above n 136, 11–12.

²⁷¹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 35 [91]. See, eg, the approach adopted by the Philippines and Hungary, outlined in Gyulai, ‘ENS Guidelines’, above n 136, 28.

²⁷² UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 35 [92]. See, eg, the good practices of Hungary, Slovakia and the Philippines, referred to in Gyulai, ‘ENS Guidelines’, above n 136, 29.

²⁷³ Batchelor, ‘The 1954 Convention’, above n 23, 36 (emphasis in original).

²⁷⁴ McAdam, ‘Position Paper’, above n 238, 6 [27] (emphasis added). See also UNHCR, *Geneva Conclusions*, above n 136, 4 [13].

²⁷⁵ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 32–3 [83]–[86]; Gyulai, ‘ENS Guidelines’, above n 136, 28. As Gyulai notes, Hungarian law specifies the following types of evidence: country information on nationality legislation; information provided by the UNHCR; information provided by foreign authorities; information provided by Hungarian diplomatic representations abroad; and evidence submitted by the applicant: at 29, citing

D *Role of the UNHCR*

It is recommended that the UNHCR be granted special rights in the statelessness determination procedure, given its expert knowledge and its ability to facilitate inquiries between states.²⁷⁶ The UNHCR may be involved in the procedure in Hungary and Moldova, and to a lesser degree in the Philippines and Georgia.²⁷⁷ Hungarian law provides that a UNHCR representative may take part in any stage of the statelessness determination procedure, including that he or she:

- (a) may be present at the applicant's interview;
- (b) may give administrative assistance to the applicant;
- (c) may gain access to the documents/files of the procedure and may make copies thereof;
- (d) shall be provided with the administrative decision and the court's judgment by the alien policing authority.²⁷⁸

E *Children and other Vulnerable Groups*

The vulnerabilities of unaccompanied minors, persons with disabilities, survivors of sexual and gender-based violence or any other vulnerable groups must be specifically considered by decision-makers, and in such cases the decision-maker should assume a greater share of the burden of proof.²⁷⁹ As McAdam notes, unaccompanied minors should 'be granted an ex officio, independent guardian throughout the determination process' to assist with their claim, as is the case in Hungary.²⁸⁰ Children who arrive with their parents may also be stateless. It is important that their claims are properly

114/2007 (V 24) *Korm Rendelet a Harmadik Országbeli Állampolgárok Beutazásáról És Tartózkodásáról Szóló 2007 Évi II Törvény Végrehajtásáról* [Government Decree 114/2007 (V24) on the Execution of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals] (Hungary) s 164(1) ('*Government Decree 114/2007*').

²⁷⁶ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 28–9 [71], 42 [116].

²⁷⁷ See Gyulai, 'ENS Guidelines', above n 136, 22–3.

²⁷⁸ *2007 Évi II Törvény a Harmadik Országbeli Állampolgárok Beutazásáról és Tartózkodásáról* [Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals] (Hungary) s 81. Note that the translation of this Act derives from Gyulai, 'ENS Guidelines', above n 136, 22. See also *Government Decree 114/2007* s 164(1).

²⁷⁹ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 42–3 [118]–[121].

²⁸⁰ McAdam, 'Position Paper', above n 238, 8 [35].

assessed rather than automatically subsumed within their parents,' especially if their own claim is stronger.²⁸¹

F *Legal Status, Rights and Entitlements*

Stateless persons are entitled to the rights set out in the *1954 Convention*, as well as general protections under international human rights law.²⁸² As explained above, the *1954 Convention* affords an almost identical legal status to stateless persons as provided by the *Refugee Convention*.²⁸³ In light of these international standards, and mindful of the structure of the Australian asylum system, stateless persons should be accorded the same legal status as refugees and beneficiaries of complementary protection, and their family members should be granted derivative status.²⁸⁴ They should be granted permanent protection visas that provide for the possibility of naturalisation, in accordance with art 32 of the *1954 Convention*.²⁸⁵

Indeed, as the Australian government noted in the complementary protection context:

our view is that all persons recognised to be in need of international protection should benefit from similar basic civil, political, economic and social rights as those afforded to refugees and that their need for protection can be as long in duration.²⁸⁶

²⁸¹ Ibid [36]; UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 28–9 [71].

²⁸² Like refugee status, recognition that a person is stateless is declaratory, not constitutive, in nature: UNHCR, *Geneva Conclusions*, above n 136, 6 [21].

²⁸³ See above Part III. However, there are several differences, as noted in above n 66.

²⁸⁴ McAdam, 'Position Paper', above n 238, 9 [43]. As the Department has observed, this can 'avoid potential adverse effects on the family unit': Department of Immigration and Citizenship (Cth), *Draft Complementary Protection Visa Model* (October 2008) 4.

²⁸⁵ Article 32 provides: 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings'. See also UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 53 [148]. Submissions made to Parliament about the rationale for granting refugees and beneficiaries of complementary protection the same status, which apply analogously here, are also relevant: Michelle Foster and Jason Pobjoy, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, 5–12; Jane McAdam, Submission No 21 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, 2–3 [1]–[2], 5 [8].

²⁸⁶ Department of Immigration and Citizenship (Cth), *Draft Complementary Protection Visa Model*, above n 284, 6, quoted in McAdam, 'Position Paper', above n 238, 9 [41].

Accordingly, an identical status should be granted to stateless persons. As McAdam notes, '[t]his approach is also consistent with the Government's visa rationalisation programme',²⁸⁷ and reduces the chances of people appealing their status.

Finally, the *1954 Convention* does not permit states to exclude persons from recognition as stateless persons simply because they have given up their nationality voluntarily. However, while the matter of free choice is irrelevant to determining eligibility, it may 'be pertinent to the matter of the treatment received thereafter', since they may be able to reacquire that nationality.²⁸⁸ In the unlikely event that a person were to voluntarily renounce his or her nationality solely for the purpose of claiming protection as a stateless person in Australia,²⁸⁹ 'the legislation could stipulate that protection would not be forthcoming if the individual could recover his or her former nationality within a reasonable period of time.'²⁹⁰ McAdam suggests that:

What is considered 'reasonable' will depend on all the circumstances of the case, including whether or not [the applicant] is in immigration detention (and if [the applicant] is, then a shorter timeframe is appropriate), whether nationality can be automatically reacquired, the circumstances in which the person will live pending that determination, and so on.²⁹¹

In some cases, whether or not renunciation was, in fact, 'voluntary' would need to be very carefully scrutinised.

VII CONCLUSION

In this article, we have begun the process of highlighting the predicament and protection needs of stateless persons in Australia. As a traditionally overlooked and radically under-explored phenomenon, there is very little information about the numbers of stateless persons who have arrived in Australia, and little by way of academic research or scholarship exploring their plight.

²⁸⁷ McAdam, 'Position Paper', above n 238, 9 [42]. See also Department of Immigration and Citizenship (Cth), *Draft Complementary Protection Visa Model*, above n 284, 4.

²⁸⁸ UNHCR, *Handbook on Protection of Stateless Persons*, above n 20, 21 [51]; see also at 56 [161]–[162].

²⁸⁹ See generally UNHCR, *Prato Conclusions*, above n 136, 4 [20].

²⁹⁰ McAdam, 'Position Paper', above n 238, 7 [30]. See also Gábor Gyulai, *Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (Hungarian Helsinki Committee, 2010) 15.

²⁹¹ McAdam, 'Position Paper', above n 238, 7 [30].

Despite ratifying the core treaties decades ago, Australia continues to fail to respond to the protection needs of stateless persons who arrive in Australia. While many stateless persons undoubtedly benefit from protection in Australian law pursuant to the *Refugee Convention*, this is not the solution for all stateless persons since statelessness on its own is not a ground for refugee protection.

As the former UN High Commissioner for Refugees, António Guterres, has observed, '[s]tatelessness is a profound violation of an individual's human rights.'²⁹² In this article, we have highlighted the importance of greater understanding and awareness of stateless persons in Australia, especially as a human rights issue, and have identified the need for a comprehensive mapping exercise. Most importantly, however, we have explained why Australia should adopt a dedicated procedure for the identification and conferral of legal status on stateless persons in Australia. As Guterres has also said, it is 'deeply unethical to perpetuate the pain [statelessness] causes when solutions are so clearly within reach.'²⁹³ The creation of a statelessness status determination procedure to provide stateless persons in Australia with a legal status is one such solution.

²⁹² UNHCR, *Global Action Plan*, above n 35 (inside front cover).

²⁹³ *Ibid.*