

Joint Submission to the  
Human Rights Council

# Universal Periodic Review

37<sup>th</sup> Session

3<sup>rd</sup> Cycle

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## Australia

Peter McMullin Centre on Statelessness  
Statelessness Network Asia Pacific  
Refugee Advice & Casework Service  
Institute on Statelessness and Inclusion

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Peter McMullin  
Centre on Statelessness

**RACS**  
REFUGEE ADVICE & CASEWORK SERVICE



Statelessness  
Network  
Asia Pacific



Institute on  
Statelessness and  
Inclusion

# Joint Submission to the Human Rights Council

at the 37<sup>th</sup> Session  
of the Universal Periodic Review.

## Australia

### Introduction

- 1 The Peter McMullin Centre on Statelessness (**PMCS**),<sup>1</sup> Refugee Advice & Casework Service (**RACS**),<sup>2</sup> Statelessness Network Asia Pacific (**SNAP**),<sup>3</sup> and Institute on Statelessness and Inclusion (**ISI**)<sup>4</sup> make this joint submission to the Universal Periodic Review (**UPR**), on the right to a nationality and human rights challenges pertaining to statelessness in Australia.
- 2 Four key areas of concern are raised in this submission:
  - 2.1 **Australia lacks a statelessness determination procedure, or specific visa category for stateless persons**, leaving stateless persons in Australia in a ‘limbo characterised by vulnerability, insecurity and marginalisation’.<sup>5</sup>
  - 2.2 **Stateless persons in Australia are at real risk of mandatory, prolonged and indefinite detention**, noting that the High Court of Australia (**HCA**) has found it permissible to detain stateless persons indefinitely.<sup>6</sup>
  - 2.3 **Australia’s existing, and proposed citizenship deprivation powers risk rendering persons stateless**. The recent general trend of expanding citizenship deprivation powers in Australia has the capacity to render persons stateless, and increase the global stateless population.<sup>7</sup>
  - 2.4 Stateless persons face a disproportionate risk as a result of the **COVID-19 pandemic**.

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<sup>1</sup> The Peter McMullin Centre on Statelessness<sup>1</sup> (**PMCS**) is an expert centre at the University of Melbourne’s Law School that undertakes research, teaching and engagement activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific region, and as appropriate more broadly. For more information see: <https://law.unimelb.edu.au/centres/statelessness>.

<sup>2</sup> The Refugee Advice & Casework Service (**RACS**) is a community legal centre in New South Wales, Australia dedicated to assisting people seeking asylum and refugees apply for protection in Australia. RACS has a dedicated program to assist stateless children born in Australia to apply for citizenship under the statelessness provisions. RACS currently assists approximately 100 children in this process and works in collaboration with PMCS in regards to research, policy and community advocacy in regards to statelessness in Australia. For more information, see: <https://www.racs.org.au/>

<sup>3</sup> The Statelessness Network Asia Pacific (**SNAP**) is a civil society coalition with the goal of promoting collaboration on addressing statelessness in Asia and the Pacific. Launched in November 2016, the Statelessness Network Asia Pacific seeks to promote collaboration through three focus areas: developing resources for evidence-based action, facilitating capacity strengthening opportunities and providing technical support to SNAP’s members. For more information, see: <https://www.statelessnessnetworkasiapacific.org/>.

<sup>4</sup> The Institute on Statelessness and Inclusion<sup>4</sup> (**ISI**) is an independent non-profit organisation dedicated to promoting an integrated, human rights-based response to the injustice of statelessness and exclusion. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness. The Institute has made nearly 70 country-specific UPR submissions on the human rights of stateless persons, and also compiled summaries of the key human rights challenges related to statelessness in all countries under review under the 23rd to the 36th UPR Sessions. For more information see: [www.institutesi.org](http://www.institutesi.org).

<sup>5</sup> Michelle Foster, Jane McAdam and Davina Wadley, ‘The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge’ (Pt 2) (2016) 40(2) *Melbourne University Law Review* 456, 459, 497.

<sup>6</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562; *M47/2018 v Minister for Home Affairs* [2019] HCA 17.

<sup>7</sup> Peter McMullin Centre on Statelessness, Submission No 96 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Nationhood, National identity and Democracy* (30 September 2019) 4 <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0009/3253446/Submission-96\\_Nationhood\\_nov19.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0009/3253446/Submission-96_Nationhood_nov19.pdf)>.

- 3 Despite a relatively high birth registration rate nationally (approximately 96%), Australia's Aboriginal and Torres Strait Islander (ATSI) population continue to experience a vastly disproportionate rate of unregistered births.<sup>8</sup> For example, statistics indicate that as many as one in six ATSI children are born without a birth certificate in the state of Queensland, rendering them 'legally invisible.'<sup>9</sup> While the HCA recently held that an ATSI person who is not an Australian citizen cannot be considered an 'alien' for the purposes of the *Migration Act 1958* (Cth),<sup>10</sup> access to birth registration for the ATSI community remains an issue of concern.
- 4 Although the scope of this submission does not cover issues pertaining to birth registration in ATSI communities, we wish to acknowledge the significance of this issue in Australia, and consequentially the importance of Government bodies working closely with ATSI communities and ATSI lead organisations in addressing this important issue.

## Australia's Universal Periodic Review under the First and Second Cycle

### The First Cycle – 2010 – 11

- 5 Australia's 1<sup>st</sup> cycle review took place in January 2011 under the 10<sup>th</sup> session of the UPR Working Group. 145 recommendations were made, of which 137 were accepted wholly or partly.<sup>11</sup>
- 6 Whilst there were no recommendations specifically relating to statelessness, concerns regarding Australia's treatment of stateless persons were raised as follows:
  - 6.1 In the compilation of United Nations (UN) Information Report, the Office of the High Commissioner for Human Rights (OHCHR) highlighted that the Committee on the Elimination of Racial Discrimination (CERD) 'regretted that the Australian High Court has found that it is lawful for a stateless person to be detained indefinitely'.<sup>12</sup>
  - 6.2 Ghana referred to the concerns expressed regarding Australia's asylum-seeker and refugee policy, specifically drawing attention to the possibility of 'indefinite detention of stateless persons'.<sup>13</sup>

### The Second Cycle - 2015

- 7 Australia's 2<sup>nd</sup> cycle review took place in November 2015 under the 23<sup>rd</sup> session of the UPR Working Group. 290 recommendations were made; Australia accepted 150 and noted 140.<sup>14</sup>

<sup>8</sup> Paula Gerber and Melissa Castan, Castan Centre for Human Rights Law, Submission to The Office of the United Nations High Commissioner for Human Rights, *Examples of best practices to ensure the registration of children, namely those in situation of risk and marginalized: Human Rights Council resolution 34/15* (31 October 2017) 2 – 5 <<https://www.ohchr.org/Documents/Issues/Children/BirthRegistrationMarginalized/CastanCentreSubmission.pdf>>.

<sup>9</sup> Phil Clarke, Queensland Ombudsman, *The Indigenous Birth Registration Report: An investigation into the under-registration of Indigenous births in Queensland* (Report, June 2018) 7 <<https://www.ombudsman.qld.gov.au/improve-public-administration/reports-and-case-studies/investigative-reports/the-indigenous-birth-registration-report>>.

<sup>10</sup> *Love v Commonwealth of Australia, Thoms v Commonwealth of Australia* [2020] HCA 3.

<sup>11</sup> *Human Rights Council, Report of the Human Rights Council on its Seventeenth Session*, UN Doc A/HRC/17/2 (24 May 2012) paras 456-457 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/136/30/PDF/G1213630.pdf?OpenElement>>.

<sup>12</sup> *Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Australia*, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) para 49 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/175/67/PDF/G1017567.pdf?OpenElement>>.

<sup>13</sup> *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/17/10 (24 March 2011) para 78 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>>.

<sup>14</sup> *Report of the Human Rights Council on its thirty-first session*, UN Doc A/HRC/DEC/31/108 (6 April 2016).

- 8 Concerns regarding Australia’s treatment of stateless persons were raised as follows:
- 8.1 The Committee against Torture (**CAT**) noted concern that ‘stateless persons whose asylum claims had not been accepted and refugees with an adverse security or character assessment could be detained indefinitely’.<sup>15</sup>
- 8.2 The United Nations High Commissioner for Refugees (**UNHCR**) raised concerns regarding the transfer of asylum seekers, including children who might be stateless to third countries, or back to their country of origin,<sup>16</sup> and recommended that Australia immediately cease this practice.<sup>17</sup>
- 9 Australia accepted the following recommendations related to *Statelessness and the Right to Nationality*:<sup>18</sup>
- 9.1 **France**: ‘Ensure that an Australian cannot be deprived of citizenship other than in exceptional circumstances and within the framework of a specific legal procedure’;<sup>19</sup>
- 9.2 **Poland**: ‘Eliminate the disparities in access to services by ATSI children and their families, especially by reviewing the Australian birth registration process in order to ensure that all children are registered at birth’;<sup>20</sup>
- 9.3 **Timor-Leste**: ‘Continue strengthening the efforts in promoting and protecting non-racial discriminatory policy and specifically also ensure that Aboriginal children have access to birth registration’<sup>21</sup>; and
- 9.4 **Turkey**: ‘Further strengthen efforts towards birth registration for all, with a view to encouraging access to relevant procedures’.<sup>22</sup>
- 10 One further recommendation by Kenya was only noted by Australia:<sup>23</sup>
- 10.1 **Kenya**: ‘Review the current regional offshore processing arrangement, and policy of mandatory detention of refugees, stateless persons and migrants, and uphold all human rights obligations towards refugees, stateless persons and migrants, including the principle of non-refoulement’.<sup>24</sup>

<sup>15</sup> UN Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 16/21: Australia*, UN Doc A/HRC/WG.6/23/AUS/2 (31 August 2015) para 69 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/195/70/PDF/G1519570.pdf?OpenElement>>.

<sup>16</sup> UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Australia* (March 2015) 6-7 <<https://www.refworld.org/docid/563863454.html>> .

<sup>17</sup> UN Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 16/21: Australia*, UN Doc A/HRC/WG.6/23/AUS/2 (31 August 2015) para 69 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/195/70/PDF/G1519570.pdf?OpenElement>>.

<sup>18</sup> UPR Info, ‘UPR Recommendations Received by Australia’ *Database of Recommendations* (Web Page) <[https://www.upr-info.org/database/index.php?limit=0&f\\_SUR=9&f\\_SMR=All&order=&orderDir=ASC&orderP=true&f\\_Issue=All&searchReco=&resultMax=300&response=&action\\_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly](https://www.upr-info.org/database/index.php?limit=0&f_SUR=9&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly)>.

<sup>19</sup> *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/31/14 (13 January 2016) 25 [136.228] <<https://undocs.org/A/HRC/31/14>>.

<sup>20</sup> *Ibid* 18 [136.101].

<sup>21</sup> *Ibid* 18 [136.102].

<sup>22</sup> *Ibid* 22 [136.171].

<sup>23</sup> *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia - Addendum*, UN Doc A/HRC/31/14/Add.1 (29 February 2016) para 62 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/039/53/PDF/G1603953.pdf?OpenElement>>.

<sup>24</sup> *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia* (n 19) 28 [136.277].

## Australia's International Obligations

- 11 The 1954 Convention relating to the Status of Stateless Persons (**1954 Convention**) and the 1961 Convention on the Reduction of Statelessness (**1961 Convention**) are the two key international instruments that address the issue of statelessness. The 1954 Convention defines statelessness and establishes a protection framework for stateless individuals. The 1961 Convention requires states to establish safeguards aimed at reducing and preventing statelessness.
- 12 Australia has ratified both the 1954 Convention and the 1961 Convention, and has not made any reservations.<sup>25</sup>
- 13 Australia is also party to several international agreements that ensure the right to nationality and protect the rights of stateless persons. These include:
  - 13.1 The International Covenant on Civil and Political Rights (**ICCPR**).<sup>26</sup>  
*Article 24(3) provides that every child has the right to acquire a nationality.*
  - 13.2 The International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**).<sup>27</sup>  
*Article 5(d)(iii) provides that States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee equality before the law in the enjoyment of the right to nationality.*
  - 13.3 The Elimination of All Forms of Discrimination against Women (**CEDAW**).<sup>28</sup>  
*Article 9 provides that parties shall grant women equal rights with men to acquire, change or retain their nationality and with respect to the nationality of their children.*
  - 13.4 The Convention on the Rights of the Child (**CRC**).<sup>29</sup>  
*Articles 7 and 8 provide that a child will have the right, from birth, to acquire and preserve their nationality.*
  - 13.5 The Convention on the Rights of Persons with Disabilities (**CRPD**).<sup>30</sup>  
*Article 18 provides that persons with disabilities have the right to acquire and change nationality and must not be deprived of their nationality arbitrarily or on the basis of disability.*

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<sup>25</sup> *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

<sup>26</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia ratified the ICCPR on 13 August 1980: UN Treaty Collection, Chapter IV, 4. *International Covenant on Civil and Political Rights*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>>.

<sup>27</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 600 UNTS 195 (entered into force 4 January 1969). Australia ratified the ICERD on 30 September 1975: UN Treaty Collection, Chapter IV, 2. *Convention on the Elimination of All Forms of Racial Discrimination*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf>>.

<sup>28</sup> *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). Australia ratified the CEDAW on 28 July 1983: UN Treaty Collection, Chapter IV, 8. *Convention on the Elimination of All Forms of Discrimination against Women*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>>.

<sup>29</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified the CRC on 17 December 1990: UN Treaty Collection, Chapter IV, 11. *Convention on the Rights of the Child*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>>.

<sup>30</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Australia ratified the CRPD on 17 July 2008: UN Treaty Collection, Chapter IV, 15. *Convention of the Rights of Persons with Disabilities*, 1 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf>>.

- 14 We note that as of July 2020, Australia has not taken steps to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was recommended by many States in the first and second UPR cycles.<sup>31</sup>

## Overview of Australia's Legal Framework for Nationality and Statelessness

### Legal Framework for Nationality

- 15 Citizenship is not defined under the Australian Constitution,<sup>32</sup> nor does Australia have a National Bill of Rights. Furthermore, Australia does not have a procedure within its legislative framework for determining who is a 'stateless person.'<sup>33</sup>
- 16 The *Australian Citizenship Act 2007* (Cth) (the **Citizenship Act**) provides the legal framework for nationality in Australia. Accordingly, citizenship can be obtained by automatic acquisition,<sup>34</sup> or application.<sup>35</sup>
- 17 Automatic acquisition of citizenship for persons born in Australia is limited to certain criteria stipulated in Section 12(1) of the Citizenship Act:<sup>36</sup>
- 17.1 a parent of the person is an Australian citizen, or a permanent resident, at the time the person was born; or
  - 17.2 the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.<sup>37</sup>

### Nationality & Statelessness

- 18 Section 21(8) of the Citizenship Act provides that a person born in Australia who is not, has never been, and is not entitled to acquire citizenship or nationality of a foreign country, is eligible for Australian citizenship.<sup>38</sup>
- 19 The intention of the Australian Parliament in including s 21(8) was to ensure Australia's obligations under the 1961 Convention were met by ensuring that no-one born in Australia remains stateless.<sup>39</sup>
- 20 The legislative framework does not, however account for stateless persons who were not born in Australia, or who previously possessed citizenship from any country which has been revoked or otherwise lost.

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<sup>31</sup> *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia* (n 13) [86.7] (Thailand), [86.9] (Argentina), [86.10] (Algeria, Bolivia, Turkey, Philippines, Bosnia and Herzegovina); *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia* (n 19) [136.36] – [136.49] (Mexico, Algeria, Ghana, Plurinational State of Bolivia, Turkey, Sri Lanka, Egypt, Honduras, Indonesia, Senegal, Sierra Leone, Bahrain, Benin and Chile), [136.237] (Philippines); UN Human Rights Council, *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Australia*, UN Doc A/HRC/WG.6/23/AUS/3 (10 August 2015) [27] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/180/84/PDF/G1518084.pdf?OpenElement>>.

<sup>32</sup> *Australian Constitution*.

<sup>33</sup> Michelle Foster, Jane McAdam and Davina Wadley, 'The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure' (Pt 1) (2016) 40(2) *Melbourne University Law Review* 401, 421.

<sup>34</sup> *Australian Citizenship Act 2007* (Cth) s 12(1).

<sup>35</sup> *Ibid* s 16.

<sup>36</sup> *Ibid* s 12(1).

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* s 21(8).

<sup>39</sup> Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 472-73, quoting Revised Explanatory Memorandum, *Australian Citizenship Bill 2005* (Cth) 38.

- 21 Furthermore, even when a person has a strong prima facie entitlement to Australian citizenship under s 21(8), they are likely to experience significant delays and administrative barriers throughout the application process, as there are no mandated timeframes for the acquisition of citizenship even when all criteria are met, and the final determination is based on the discretion of the Minister for Immigration, Citizenship and Multicultural Affairs.<sup>40</sup>
- 22 Those who are stateless but do not meet the requirements for citizenship can only reside, study and work in Australia (and exercise other rights attaching to citizenship) if they are eligible for a temporary or substantive visa or successfully obtain ministerial intervention.<sup>41</sup>
- 23 Generally, people who are unsuccessful in obtaining a visa are expected to return to their country of origin.<sup>42</sup> However, stateless individuals are not nationals of their countries of origin and are therefore usually unable to return.<sup>43</sup> This leaves stateless individuals who do not qualify for citizenship at risk of prolonged or indefinite periods of immigration detention.

## Statelessness in Australia – A Snapshot

- 24 There are many stateless persons in Australia, however exact figures are unknown due to a 'lack of coordinated or consistent approach' to recording such persons.<sup>44</sup>
- 25 According to the most recently available Department of Home Affairs (DHA) statistics, there were **at least** 4,025 recorded stateless persons in Australia as at July 2020. This includes:
- (A) 46 stateless persons in immigration detention;<sup>45</sup>
  - (B) 107 stateless persons in community detention;<sup>46</sup>
  - (C) 1,015 stateless persons on Bridging E Visas;<sup>47</sup>
  - (D) 2,104 stateless persons on Temporary Visas;<sup>48</sup> and
  - (E) 753 stateless persons awaiting Temporary Visa determinations.<sup>49</sup>
- 26 These figures do not include stateless persons who arrived in Australia through the annual Special Humanitarian Program or the national Migration Program; nor do they include Permanent Residents or Permanent Protection Visas holders. As such, the true figure could be much higher. The lack of accurate statistical information available is further exacerbated by the lack of a formal procedure through which stateless people may be identified and protected, as addressed under Issue 1 below.

<sup>40</sup> The Peter McMullin Centre on Statelessness is currently researching the legal and administrative barriers stateless children in Australia face in obtaining Australian citizenship, in partnership with the Refugee Advice Casework Service. See Katie Robertson 'A Place to Call Home – Child Statelessness in Australia,' Peter McMullin Centre on Statelessness, <<https://law.unimelb.edu.au/centres/statelessness/research/research-projects/a-place-to-call-home-child-statelessness-in-australia>> and Refugee Advice Casework Service, 'Stateless Children Program,' <<https://www.racs.org.au/stateless-children-program>>.

<sup>41</sup> Refugee Council of Australia, *Statelessness in Australia* (August 2015) 14-15 <<https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/1508-Statelessness.pdf>>.

<sup>42</sup> Ibid 14.

<sup>43</sup> Ibid 14-15.

<sup>44</sup> Foster, McAdam and Wadley, 'The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure' (n 33) 416.

<sup>45</sup> Department of Home Affairs (Cth), Australian Border Force, *Immigration Detention and Community Statistics Summary* (31 March 2020) 8 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>>

<sup>46</sup> Ibid.

<sup>47</sup> Department of Home Affairs (Cth), Australian Border Force, *Illegal Maritime Arrivals on Bridging E Visa* (31 March 2020) <<https://www.homeaffairs.gov.au/research-and-stats/files/illegal-maritime-arrivals-bve-march-2020.pdf>>.

<sup>48</sup> Australian Government, Department of Home Affairs, *IMA Legacy Caseload, Report on Processing Status Outcomes* (April 2019) 3 <<https://www.homeaffairs.gov.au/research-and-stats/files/ima-legacy-caseload-oct-2019.pdf>>.

<sup>49</sup> Ibid 4.



- 27 We also note that these figures may count certain stateless persons twice; for example, it is possible that of the 753 stateless persons awaiting Temporary Visa determinations (category (E) above), some are also currently on Bridging Visas, and thus are included in the overall number of stateless persons on Bridging E Visas (category (C) above). However, it is not possible to determine this level of detail based on the limited nature of published information.
- 28 With no coordinated approach to collecting information about stateless persons in Australia, difficulties therefore exist in identifying and researching the extent of Australia's stateless population, demonstrating 'the invisibility of the predicament of stateless persons'.<sup>50</sup>
- 29 Despite these available statistics, Australia has routinely either not provided data to the UNHCR, or reported that there are 'zero' stateless persons in Australia. In 2017, for the first time, Australia reported '52' stateless persons in Australia.<sup>51</sup> In 2018 Australia reported '132' stateless persons to the UNHCR, or approximately 3% of the known number of stateless persons currently in Australia, based on the above figures.<sup>52</sup>
- 30 Curiously, in 2019, UNHCR's reporting of stateless persons in Australia is recorded as a '-', indicating that Australia either reported zero stateless persons, or the data was 'unavailable'.<sup>53</sup>

### Australia's 2011 Pledge

- 31 In 2011, the UNHCR hosted a Ministerial Intergovernmental Event on Refugees and Stateless Persons. 62 States made pledges relating to statelessness. The Australian Government pledged:
- 'to better identify stateless persons and assess their claims. Australia is committed to minimising the incidence of statelessness and to ensuring that stateless persons are treated no less favourably than people with an identified nationality. Australia will continue to work with UNHCR, civil society and interested parties to progress this pledge'.<sup>54</sup>*
- 32 This pledge is to be commended, serving as a foundational mechanism for the necessary development and implementation of strong protections within Australia's legal framework for stateless persons.
- 33 However, little action has been taken to fulfil the commitment made or make meaningful attempts to address statelessness. Instead, mere internal departmental procedures were established to determine statelessness and the Australian Government refused to consider the creation of a dedicated visa.<sup>55</sup> These procedures are inadequate and still provide 'no legislative basis for determining statelessness'.<sup>56</sup>

<sup>50</sup> Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 497, 505.

<sup>51</sup> UNHCR, *Global Trends – Forced Displacement in 2017* (2018) 64.

<sup>52</sup> UNHCR, *Global Trends – Forced Displacement in 2018* (2019) 65.

<sup>53</sup> According to the UNHCR's Report regarding global trends in forced displacement for 2019, a dash in the data table ("-") indicates that the value is zero, not available or not applicable: UNHCR, *Global Trends – Forced Displacement in 2019* (2020) 78.

<sup>54</sup> UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais de Nations, 7–8 December 2011)* (2012) 51.

<sup>55</sup> Foster, McAdam and Wadley, 'The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure' (n 33) 415.

<sup>56</sup> Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 497.



34 It is also regrettable that despite 252 States making 360 pledges at the most recent UNHCR High-Level Segment on Statelessness in October 2019, Australia failed to make any pledge or commitment to reduce or address statelessness.<sup>57</sup>

## **ISSUE 1: Australia Lacks a Statelessness Determination Procedure, or Specific Visa Category to Recognise and Protect Stateless Persons**

35 As noted above, Australia does not have a procedure within its legislative framework to identify and protect ‘stateless persons.’<sup>58</sup>

36 Despite no explicit requirement in the 1954 Convention, it is intrinsic to the notion of identifying stateless persons that a procedure to determine who is stateless, is necessary. As noted by the UNHCR:

*“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”.*<sup>59</sup>

37 This sentiment was further iterated in a Guidance Note of the Secretary-General that ‘state based stateless determination procedures are an implicit requirement of state parties meeting their obligations under the 1954 and 1961 Conventions’.<sup>60</sup>

38 Currently, Australia has no such process, and as such, key treaty obligations are yet to be implemented into domestic law. Without any mechanisms to determine statelessness, many affected persons can remain forever ‘legally invisible’ and be denied basic rights. As noted by Foster, McAdam and Wadley:

*“While some (stateless persons) may be discovered through the refugee status determination process, others may go undetected. Even when a stateless person is identified, there is no domestic legal status that attaches unless he or she is also recognised as a refugee or beneficiary of complementary protection. As such, he or she may be at risk of indefinite detention, or only be eligible for a temporary visa with a limited set of entitlements”.*<sup>61</sup>

39 A statelessness determination procedure is required, as while many stateless persons may receive protection as a refugee for other reasons, ‘statelessness on its own is not a ground for refugee protection’.<sup>62</sup> Furthermore, the refugee status determination process does not provide an avenue for *in situ* stateless populations.

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<sup>57</sup> ‘Results of the High-Level Segment on Statelessness’, UNHCR (Web Page) <<https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/#>>.

<sup>58</sup> Foster, McAdam and Wadley, ‘The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure’ (n 33) 421.

<sup>59</sup> UNHCR, *Handbook on the Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014) 6 [8].

<sup>60</sup> Guidance Note of the Secretary-General, *The United Nations and Statelessness* (November 2018) 7.

<sup>61</sup> Foster, McAdam and Wadley, ‘The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge’ (n 5) 460.

<sup>62</sup> Foster, McAdam and Wadley, ‘The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure’ (n 33) 455.

- 40 In accordance with UNHCR Guidelines, statelessness determination procedures should be ‘formalized in law’ and guarantee basic due process rights including an ‘effective right to appeal...[to] an independent body’.<sup>63</sup> The burden of proof should be shared,<sup>64</sup> the standard of proof should be to a ‘reasonable degree’,<sup>65</sup> states may combine statelessness and refugee determination procedures, while maintaining confidentiality for asylum applications,<sup>66</sup> everyone on the territory should have access to the procedure, regardless of whether or not they are lawfully in the state,<sup>67</sup> the UNHCR should have a role in assisting in the development and implementation of procedures,<sup>68</sup> and ‘age, gender and diversity considerations may require that some individuals are afforded additional procedural and evidentiary safeguards.’<sup>69</sup>
- 41 Many of the above considerations are also flagged by Foster, McAdam and Wadley – specifically in relation to the Australian context. They also note that there are several clear reasons to support the necessity of a legislative statelessness determination procedure, as it would:
- 41.1 Ensure ‘fairness, transparency and clarity’;<sup>70</sup>
  - 41.2 Assist in identifying ‘root causes’ and ‘trends’ of statelessness;<sup>71</sup>
  - 41.3 Assist in accurately assessing ‘the size and profile of stateless persons in Australia’;<sup>72</sup> and
  - 41.4 Reduce costs to government (e.g. ‘costs could be saved on unnecessary detention’).<sup>73</sup>
- 42 Australia should provide to stateless persons the same protection and legal status as is afforded to refugees and beneficiaries of complementary protection, and their families should be granted derivative status.<sup>74</sup>
- 43 Almost all stateless persons mentioned in paragraph 23 arrived in Australia by boat, or are the children of such persons and therefore also deemed ‘unauthorised maritime arrivals’<sup>75</sup>. Due to their arrival in Australia as unlawful non-citizens they are only eligible for a three-year Temporary Protection Visa (TPV) or a five-year Safe Haven Enterprise Visa (SHEV).<sup>76</sup> A TPV provides no pathway to permanency and a SHEV may only lead to a permanent visa option if certain regional work or study criteria are met; even then the criteria for future visas will be effectively unattainable given the language and financial requirements.<sup>77</sup> This means that effectively these persons will be stuck in three or five-year cycles of reapplying for temporary visas and repeatedly demonstrating their need for protection.
- 44 This was a change in the law introduced in 2014,<sup>78</sup> moving away from the previous permanent protection visa. A permanent protection visa enlivened a person’s opportunity to later apply

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<sup>63</sup> UNHCR, *Handbook on the Protection of Stateless Persons* (n 59) 28 [71], 30 [76].

<sup>64</sup> *Ibid* 34 [89].

<sup>65</sup> *Ibid* 34 [91].

<sup>66</sup> *Ibid* 27-28 [66].

<sup>67</sup> *Ibid* 28 [69].

<sup>68</sup> *Ibid* 42 [116].

<sup>69</sup> *Ibid* 42-43 [118].

<sup>70</sup> Foster, McAdam and Wadley, ‘The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure’ (n 33) 446.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid* 453.

<sup>75</sup> Para 35.

<sup>76</sup> *Migration Regulations 1994* (Cth), Schedule 2 – Subclass 785 & Subclass 790.

<sup>77</sup> *Migration Act 1958* (Cth) s35A.

<sup>78</sup> *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

for citizenship in Australia, once the relevant residency requirements were met. Ultimately the introduction of this temporary visa framework has resulted in Australia moving further away from its pledge to minimise the incidence of statelessness as the temporary visa framework only serves to perpetuate the statelessness of the persons eligible for protection, whilst preventing their access to citizenship.

- 45 A specific visa category should also be established for all recognised stateless persons, irrespective of their mode of arrival to Australia, providing for ‘permanent protection’ with the possibility of naturalisation, in accordance with article 32 of the 1954 Convention.<sup>79</sup>

## ISSUE 2: The Prolonged and Indefinite Detention of Stateless Persons in Australia

- 46 As set out by UNHCR, ‘the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention’.<sup>80</sup> The risk of detention is heightened in the Australian context, due to the mandatory nature of immigration detention in the country. Currently, Australia does not grant protection visas to people on the basis of statelessness alone. Typically, when a person is refused asylum, they are removed from Australia and returned to their country of origin, however, there is no country that stateless persons can be returned to as a national.<sup>81</sup>
- 47 Other than the possibility of Ministerial intervention, stateless persons who do not meet the refugee criteria are likely exposed to ‘prolonged indefinite detention’.<sup>82</sup>
- 48 The Australian High Court has held that upon proper statutory construction of the *Migration Act 1958* (Cth), stateless persons can lawfully be detained indefinitely. In *Al-Kateb v Godwin*,<sup>83</sup> the High Court held that due to Mr Al-Kateb’s failed claim for protection, the unavailability of a visa as a result of his status as a stateless Palestinian born in Kuwait, and his inability to be returned to another country, it was lawful to indefinitely detain him.
- 49 More recently, the High Court rejected an opportunity to revise *Al-Kateb v Godwin*; the indefinite detention of stateless persons in Australia therefore remains a pertinent issue.<sup>84</sup>
- 50 As neither Nauru nor Papua New Guinea have ratified the 1954 Convention, further concern exists over the rights afforded to stateless persons who are held in Australia’s offshore immigration detention locations.<sup>85</sup>
- 51 To date, the UN Human Rights Committee has issued numerous decisions in which it finds Australia’s policy of mandatory immigration detention in breach of article 9 of the ICCPR.<sup>86</sup>

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<sup>79</sup> Ibid 453.

<sup>80</sup> UNHCR, *Handbook on the Protection of Stateless Persons* (n 59) 41 [115].

<sup>81</sup> Ibid 443.

<sup>82</sup> Ibid 442–443.

<sup>83</sup> *Al-Kateb v Godwin* (n 6).

<sup>84</sup> *M47/2018 v Minister for Home Affairs* (n 6).

<sup>85</sup> The Australian Government has been detaining people seeking asylum who arrived in Australia without a valid visa by boat in Nauru and Papua New Guinea since 2012, raising serious human rights concerns. For more information, see ‘Offshore Processing’, *Refugee Council of Australia* (Web Page) <<https://www.refugeecouncil.org.au/offshore-processing/>>.

<sup>86</sup> Human Rights Committee, *Views: Communication No 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003); Human Rights Committee, *Views: Communication No 1324/2004*, 88<sup>th</sup> sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); Human Rights Committee, *Shams et al. v. Australia*, 90<sup>th</sup> sess, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (20 July 2007); Human Rights Committee, *Views: Communication No 1069/2002*, 79<sup>th</sup> sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); Human Rights Committee, *Views: Communication No 1050/2002*, 87<sup>th</sup> sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006); Human Rights

The Working Group on Arbitrary Detention has reiterated the Human Rights Committee's views and noted that non-citizens have no effective remedy against their continued administrative detention, resulting in arbitrary detention.<sup>87</sup> The Human Rights Committee has stated that Australia is under obligation to take steps to prevent similar violations in future.<sup>88</sup>

### ISSUE 3: Australia's Existing, and Proposed Citizenship Deprivation Powers Risk Rendering Persons Stateless

- 52 There are a number of ways that a person may cease to be a citizen, under Australian law, including renunciation by application,<sup>89</sup> revocation due to offences or fraud,<sup>90</sup> revocation due to a failure to comply with special residence requirements,<sup>91</sup> cessation through engaging in terrorist related conduct,<sup>92</sup> cessation through service in the armed forces of an enemy country or declared terrorist organisation,<sup>93</sup> or cessation due to conviction for terrorism offences.<sup>94</sup>
- 53 Under international law, states have traditionally been granted broad discretion in the regulation of nationality matters. This is not, however, an absolute discretion. States' prerogative in nationality matters has been gradually limited by the evolution of human rights law.<sup>95</sup>
- 54 The *Principles on Deprivation of Nationality as a National Security Measure*,<sup>96</sup> and the *UNHCR Guidelines on Statelessness No 5: Loss and Deprivation of Nationality*<sup>97</sup> provide important

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Committee, *Views: Communication No 2229/2012*, 116<sup>th</sup> sess, UN Doc CCPR/C/116/D/2229/2012 (17 November 2016); and Human Rights Committee, *Views: Communication No 2233/2013*, 116<sup>th</sup> sess, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016); *Human Rights Council Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20 – 24 November 2017*, UN Doc A/HRC/WGAD/2017/71 (21 December 2017).

<sup>87</sup> *Human Rights Council Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20 – 24 November 2017*, 80<sup>th</sup> sess, UN Doc A/HRC/WGAD/2017/71 (21 December 2017) [53]-[55].

<sup>88</sup> Human Rights Committee, *Views: Communication No 2233/2013*, 116<sup>th</sup> sess, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016) [12].

<sup>89</sup> *Australian Citizenship Act* (n 34) s 33; see also Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 487.

<sup>90</sup> *Australian Citizenship Act* (n 34) s 34; see also Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 487.

<sup>91</sup> *Australian Citizenship Act* (n 34) s 34A; see also Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 487.

<sup>92</sup> *Australian Citizenship Act* (n 34) s 33AA; see also Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 487.

<sup>93</sup> *Australian Citizenship Act* (n 34) s 35; see also Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 487.

<sup>94</sup> *Australian Citizenship Act* (n 34) s 35A; see also Foster, McAdam and Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (n 5) 487.

<sup>95</sup> Peter McMullin Centre on Statelessness, Submission No 15 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (18 January 2019) 2 < [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0005/3025850/PMCS-Joint-Committee-Submission-Jan-2019.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0005/3025850/PMCS-Joint-Committee-Submission-Jan-2019.pdf) >.

<sup>96</sup> Principles on Deprivation of Nationality as a National Security Measure, March 2020. Available at:

<https://files.institutesi.org/PRINCIPLES.pdf>. The Principles were drafted by ISI in collaboration with the Open Society Justice Initiative and with support from the Asser Institute and Ashurst LLP. They were developed over a 30-month research and consultation period, with input from more than 60 leading experts in the fields of human rights, nationality and statelessness, counter-terrorism, refugee protection, child rights, migration and other related areas. At the time of submission, they have been endorsed by over 100 individual experts and organisations, including leading academics, UN Special Rapporteurs and Treaty Body members, litigators, judges, parliamentarians and diplomats. The Principles restate or reflect international law and legal standards under the UN Charter, treaty law, customary international law, general principles of law, judicial decisions and legal scholarship, regional and national law and practice. They articulate the international law obligations of States and apply to all situations in which States take or consider taking steps to deprive a person of nationality as a national security measure. More information is available here: <https://www.institutesi.org/year-of-action-resources/principles-on-deprivation-of-nationality>.

<sup>97</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020, HCR/GS/20/05, available at:

<https://www.refworld.org/docid/5ec5640c4.html>. The Guidelines provide authoritative guidance on the interpretation of Articles 5 – 9 of the 1961 Convention on the Reduction of Statelessness. They draw on the Summary Conclusions of the Expert Meeting on Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation held in Tunis, Tunisia on 31 October-1

guidance on the question of deprivation of nationality; the former, from a wider international law perspective, and the latter, more specifically in relation to the 1961 Convention. Accordingly, state discretion in this area is subject to the individual right to nationality,<sup>98</sup> the prohibition of arbitrary deprivation of nationality,<sup>99</sup> the prohibition of discrimination<sup>100</sup> and the obligation to avoid statelessness.<sup>101</sup> Furthermore, the impact of nationality deprivation on the enjoyment of other human rights, humanitarian and refugee law obligations and standards must be taken into consideration when assessing the legality of citizenship deprivation. These include, the right to enter and remain in one's own country, the prohibition of *refoulement*, the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the liberty and security of the person the right to private and family life; legal personhood and the rights of the child.<sup>102</sup> Any measures to deprive nationality must also comply with due process safeguards and the right to a fair trial.<sup>103</sup>

55 In 2015 the Australian Parliament passed amendments to the Citizenship Act through the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) that broadened the Government's power to strip Australian nationals of their citizenship.<sup>104</sup> These amendments included:

- 55.1 The introduction of section 33A, allowing citizenship cessation if a person engages in various terrorist activities deemed '[inconsistent] with their allegiance to Australia';<sup>105</sup>
- 55.2 The amendment of section 35, providing for citizenship cessation due to service in the armed forces of an enemy country or a declared terrorist organisation defined in section 35AA;<sup>106</sup>
- 55.3 The introduction of section 35A, providing for citizenship cessation upon the Minister's determination if a person has been convicted for terrorism offences or certain other offences demonstrating a '[repudiation of] their allegiance to Australia'.<sup>107</sup>

56 Under the 1961 Convention, deprivation of nationality is generally prohibited where it would render a person stateless.<sup>108</sup> Although Article 8(3) of the 1961 Convention contains a narrow set of exceptions under which a state may deprive a person of nationality even where that may render the person stateless, the exclusion clause is applicable only if the state made a declaration to that effect at the time of accession. Australia did not make such a

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November 2013 ("Tunis Conclusions") and the Expert Meeting on Developments related to Deprivation of Nationality held in Geneva, Switzerland on 5-6 December 2018.

<sup>98</sup> *Human Rights Council Resolution 7/10, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/7/10 (27 March 2008); *Human Rights Council Resolution 10/13, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/10/13 (26 March 2009); *Human Rights Council Resolution 13/2, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/13/2 (24 April 2010); *Human Rights Council Resolution 20/4, The right to a nationality: women and children*, UN Doc A/HRC/RES/20/4 (16 July 2012); *Human Rights Council Resolution 20/5, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/20/5 (16 July 2012); *Human Rights Council Resolution 26/14, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/26/14 (11 July 2014); *Human Rights Council Resolution 32/5, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/32/5 (15 July 2016).

<sup>99</sup> Principles on Deprivation of Nationality as a National Security Measure, March 2020. Available at: <https://files.institutesi.org/PRINCIPLES.pdf>, Principle 7. See also, the Draft Commentary to the Principles, available at: [files.institutesi.org/PRINCIPLES\\_Draft\\_Commentary.pdf](https://files.institutesi.org/PRINCIPLES_Draft_Commentary.pdf).

<sup>100</sup> *Ibid* Principle 6.

<sup>101</sup> *Ibid* Principle 5.

<sup>102</sup> *Ibid* Principle 9.

<sup>103</sup> *Ibid* Principle 8.

<sup>104</sup> *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

<sup>105</sup> *Australian Citizenship Act* (n 34) s 33AA.

<sup>106</sup> *Ibid* ss 35, 35AA.

<sup>107</sup> *Ibid* s 35A.

<sup>108</sup> *Convention on the Reduction of Statelessness* (n 25) art 8(1). See also, the UNHCR, *Guidelines on Statelessness No. 5* (above n 97).

declaration.<sup>109</sup> Furthermore, other international law standards, as set out in paragraph 52 above, restrict state discretion to deprive nationality, even where the person may not be made stateless as a result. For example, The UN Special Rapporteur on racism has stated that:

*“States’ obligations to ensure equality and non-discrimination with regards to the enjoyment of nationality apply with regard to all citizenship deprivation decisions, not only in cases where deprivation of citizenship might result in statelessness.”<sup>110</sup>*

57 As noted by the PMCS in previous submissions to the Australian Government, existing citizenship deprivation provisions in the Citizenship Act risk rendering Australian citizens stateless, and arguably breach Australia’s obligations under international law, including of the prohibition of arbitrary deprivation of nationality.<sup>111</sup>

58 A Bill currently before Parliament, if passed, would render Australians further vulnerable to the risk of statelessness. The *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (the **Bill**) amends existing citizenship deprivation provisions to provide that, at the discretion of the Minister for Home Affairs, a person who is a national or citizen of a country other than Australia ceases to be an Australian citizen in three circumstances:

58.1 renunciation by conduct when a person engages in specified terrorism related activities;

58.2 cessation of citizenship when a person fights for, or is in the service of, a declared terrorist organisation outside of Australia; or

58.3 cessation by conviction for a specified offence with a sentencing period of at least 3 years.<sup>112</sup>

59 The Bill risks further rendering the Citizenship Act inconsistent with Australia's international legal obligations by weakening already inadequate protections against statelessness, and further undermining the right to nationality and the institution of citizenship.<sup>113</sup>

## **ISSUE 4: The Impact of the COVID-19 Pandemic on Stateless Persons in Australia**

60 The COVID-19 pandemic is having a serious impact on people all over the world, particularly the most vulnerable. This includes stateless people, who face disproportionate risks.<sup>114</sup>

61 A joint statement by 84 civil society organisations, observes that:

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<sup>109</sup> *Convention on the Reduction of Statelessness* (n 25) art 8(3); Peter McMullin Centre on Statelessness, Submission No 19 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (16 October 2019) 6 <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0005/3209468/Sub-19-Peter-McMullin-Centre-on-Statelessness.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0005/3209468/Sub-19-Peter-McMullin-Centre-on-Statelessness.pdf)>.

<sup>110</sup> UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018) [30].

<sup>111</sup> Peter McMullin Centre on Statelessness, Submission No 18 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Citizenship Renunciation by Conduct and Cessation Provisions* (13 August 2019) 2 <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3151978/Sub-18-PeterMcMullinCentre.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3151978/Sub-18-PeterMcMullinCentre.pdf)>.

<sup>112</sup> *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Cth) cls 36B, 36C, 36D.

<sup>113</sup> Peter McMullin Centre on Statelessness, Submission No 19 to Parliamentary Joint Committee on Intelligence and Security, *Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (n 109) 14.

<sup>114</sup> Peter McMullin Centre on Statelessness, *Factsheet: The Potential Impact of COVID-19 on Stateless Persons* (April 2020) <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0008/3396518/COVID19\\_factsheet\\_April\\_2020-2.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3396518/COVID19_factsheet_April_2020-2.pdf)>.

*“denied nationality and deprived basic rights and welfare, the stateless were already marginalised before the crisis. They now face even greater, life threatening marginalisation, with potentially disastrous consequences.”<sup>115</sup>*

Further, an ISI Impact Report, which draws on the inputs of global partners, finds that stateless communities face devastating consequences in relation to health and wellbeing; survival and livelihoods; hate speech, racism and xenophobia; border closures and movement restrictions; insecurity and detention.<sup>116</sup>

### **Risk to Stateless Persons in Australian Immigration Detention Centres:**

- 62 As stated above, stateless persons are at high risk of being placed in immigration detention (including indefinite immigration detention) in Australia due to their immigration status and the absence of a dedicated visa category for stateless persons.
- 63 The confined and crowded conditions within immigration detention centres create a high-risk environment for the transmission and spread of COVID-19.<sup>117</sup> The Australian Government’s own health advice identifies people in detention facilities as a group most at risk of contracting the virus.<sup>118</sup>
- 64 The most recent Australian government statistics (31 March 2020) indicate 46 stateless people currently in Australian immigration detention facilities.<sup>119</sup> This figure may now be higher; DHA has advised that the number of people in immigration detention has increased during COVID-19, while the Commonwealth Ombudsman observed that certain facilities were ‘approaching capacity’.<sup>120</sup>
- 65 Australian doctors and peak medical bodies have raised concerns about the potential risk of the spread of COVID-19 within these centres.
- 66 In March 2020, The Australasian Society for Infectious Diseases and the Australian College for Infection Prevention and Control released a statement urging the Government to consider releasing people held in detention into suitable housing in the community.<sup>121</sup> The peak professional bodies note that people held in crowded conditions in detention cannot practice adequate social distancing or self-isolation.<sup>122</sup>

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<sup>115</sup> Joint statement by 84 CSOs, ‘In Solidarity with the Stateless’ (27 May 2020), available at [https://files.institutesi.org/Joint\\_Statement\\_in\\_Solidarity\\_with\\_the\\_Stateless.pdf](https://files.institutesi.org/Joint_Statement_in_Solidarity_with_the_Stateless.pdf).

<sup>116</sup> Institute on Statelessness and Inclusion, *Impact Report: Stateless in a Global Pandemic* (June 2020), available at [https://files.institutesi.org/Covid19\\_Stateless\\_Impact\\_Report.pdf](https://files.institutesi.org/Covid19_Stateless_Impact_Report.pdf).

<sup>117</sup> World Health Organization Regional Office for Europe, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance* (15 March 2020) 1 <[https://www.euro.who.int/\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1](https://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1)>; UNHCR, *The Impact of COVID-19 on Stateless Populations: Policy Recommendations and Good Practices* (May 2020) 5 <https://www.refworld.org/docid/5eb2a72f4.html>; International Committee of the Red Cross, ‘COVID-19: Protecting Prison Populations from Infectious Coronavirus Diseases’ (11 March 2020) <https://www.icrc.org/en/document/protecting-prison-populations-infectious-disease>; Allan S Keller and Benjamin D Wagner, ‘COVID-19 and Immigration Detention in the USA: Time to Act’ (2020) 5(5) *The Lancet Public Health* E245-E256 <[https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30081-5/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30081-5/fulltext)>.

<sup>118</sup> Australian Government Department of Health, ‘What You Need to Know About Coronavirus (COVID-19) (Web page, last updated 11 June 2020) < <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#who-is-most-at-risk>>.

<sup>119</sup> Department of Home Affairs (Cth), Australian Border Force, *Immigration Detention and Community Statistics Summary* (31 March 2020) 8 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>>.

<sup>120</sup> Commonwealth Ombudsman, ‘Statement by the Commonwealth Ombudsman Michael Manthorpe on the Management of COVID-19 Risks in Immigration Detention Facilities’ (Media Release, 1 June 2020) 5 <[https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0013/111235/1-July-2020-Statement-by-the-Commonwealth-Ombudsman-Michael-Manthorpe-on-the-management-of-COVID-19-risks-in-immigration-detention-facilities.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0013/111235/1-July-2020-Statement-by-the-Commonwealth-Ombudsman-Michael-Manthorpe-on-the-management-of-COVID-19-risks-in-immigration-detention-facilities.pdf)>.

<sup>121</sup> Joshua Davis and Philip Russo (open letter, 19 March 2020) <<https://www.asid.net.au/documents/item/1868>>.

<sup>122</sup> Ibid.



67 In April 2020, more than 1,100 doctors, psychiatrists and healthcare professionals co-signed a letter to the Home Affairs Minister demanding the immediate release of people in immigration detention centres into community-supported accommodation.<sup>123</sup> The letter stated that:

*'Failure to take action to release people seeking asylum and refugees from detention will not only put them at greater risk of infection and possibly death... It also risks placing a greater burden on wider Australian society and the health care system.'*<sup>124</sup>

68 The Refugee Council of Australia (RCA) – along with people held in immigration detention – has also raised concerns about insufficient protections available inside detention centres to protect people from the virus, noting some detainees have compromised immune systems and chronic medical conditions, placing them at higher risk of serious infection.<sup>125</sup>

69 Research has found that those detained in Australian immigration facilities for more than 24 months have particularly poor health.<sup>126</sup> The average period of time people spend in detention is 545 days, with 38.3% of people having been detained for more than two years.<sup>127</sup> In 2019, the Government revealed that the average period of detention for stateless persons is 574 days.<sup>128</sup>

70 Human rights organisations have also warned of the risk posed to people in immigration detention during the pandemic.<sup>129</sup>

71 In March 2020, UN agencies issued a joint statement urging states to release refugees from detention, considering the 'lethal consequences' a COVID-19 outbreak would have.<sup>130</sup>

72 The Australian Human Rights Commissioner also publicly called on the Government to urgently remove people from immigration detention centres and place them in residential community detention locations where safe to do so.<sup>131</sup>

73 Despite the Governments of Spain, Belgium, and the United Kingdom releasing people from immigration detention to better protect them – and indeed the broader community – during the pandemic,<sup>132</sup> the Australian Government has failed to do so.

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<sup>123</sup> 'Australian Doctors Call for Refugees to be Released Amid Coronavirus Fears', *SBS News* (online, 2 April 2020) <<https://www.sbs.com.au/news/australian-doctors-call-for-refugees-to-be-released-amid-coronavirus-fears>>.

<sup>124</sup> Ibid.

<sup>125</sup> Refugee Council of Australia, 'Leaving No-One Behind: Ensuring People Seeking Asylum and Refugees are Included in COVID-19 Strategies' (Web page, last updated 9 April 2020) <<https://www.refugeecouncil.org.au/priorities-covid-19/>>.

<sup>126</sup> Janette P Green and Kathy Eagar, 'The Health of People in Australian Immigration Detention Centres' (2010) 192(2) *Medical Journal of Australia* 65 <<https://www.mja.com.au/journal/2010/192/2/health-people-australian-immigration-detention-centres>>.

<sup>127</sup> Department of Home Affairs (Cth), Australian Border Force, *Immigration Detention and Community Statistics Summary* (31 March 2020) 11-12 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>>.

<sup>128</sup> As at 31 August 2019. See *2019-2020 Supplementary budget estimates*, 21/10/2019, Question 167, (Senator Nick McKim) available at <[https://www.aph.gov.au/Parliamentary\\_Business/Senate\\_estimates/legcon/2019-20\\_Supplementary\\_Budget\\_Estimates](https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2019-20_Supplementary_Budget_Estimates)>.

<sup>129</sup> International Detention Coalition (IDC) 2020, Response to Covid-19, viewed 17 April 2020, <<https://mailchi.mp/idcoalition/international-detention-monitor-defending-the-right-to-monitor-immigration-detention-in-mexico-1628329?e=c30afd6bb9>>.

<sup>130</sup> UNHCR, 'The Rights and Health of Refugees, Migrants and Stateless Must be Protected in COVID-19 Response' (Press release, 31 March 2020) <<https://www.unhcr.org/news/press/2020/3/5e836f164/rights-health-refugees-migrants-stateless-must-protected-covid-19-response.html>>.

<sup>131</sup> Stefan Armbruster, 'Human Rights Commissioner Calls for Immigration Detainees' Release Over Coronavirus Infection Fears', *SBS News* (online, 13 April 2020) <<https://www.sbs.com.au/news/human-rights-commissioner-calls-for-immigration-detainees-release-over-coronavirus-infection-fears>>.

<sup>132</sup> 'Interior abre la puerta a liberar a internos en los CIE por el coronavirus', *La Vanguardia* (online, 19 March 2020) <<https://www.lavanguardia.com/politica/20200319/474263064358/interior-abre-puerta-liberar-internos-cie.html>>; Bruno Struys, '300 mensen zonder papieren vrijgelaten: coronavirus zet DVZ onder druk', *De Morgen* (online, 19 March 2020)

74 In July 2020, the Commonwealth Ombudsman issued a statement on the management of COVID-19 risks in Australian immigration detention facilities.<sup>133</sup> The Ombudsman noted that although he was ‘broadly satisfied’ with the DHA’s implementation of site level strategies to prevent and respond to COVID-19 (including overall screening mechanisms and sufficient supplies of hand hygiene products), he cautioned the DHA ‘against complacency,’ noting that the threat posed by COVID-19 is likely to remain for some time, ‘particularly in closed environments.’<sup>134</sup> The Ombudsman expressed particular concern regarding the number of people currently held in immigration detention, and recommended that:

*‘the department works with the relevant Ministers to reduce the numbers of people held in immigration detention facilities, with a particular focus on achieving effective social distancing in the facilities, and with particular regard to detainees with underlying health issues that may render them susceptible to any outbreak of COVID-19.’<sup>135</sup>*

75 As noted by Foster and Robertson, there are a range of alternative measures to keeping people in immigration detention centres readily available to the Government. Community Detention (Residence Determination), for example, has been in operation in Australia for many years, and allows a person to live in designated residential housing with ample room for self-isolation, while ensuring immigration authorities can maintain checks and balances on community safety.<sup>136</sup> Indeed, 846 people were already living in community detention before the pandemic hit.<sup>137</sup>

### **Risk to Stateless Persons in the Australian Community**

76 More than a million people – asylum seekers on bridging visas and temporary visa holders including refugees, migrant workers and potentially stateless persons – have been left out of the Australian Government’s economic measures to support the community during the pandemic.<sup>138</sup>

77 In defending the Government’s decision to exclude temporary visa holders from substantive financial support measures, the Australian Prime Minister urged those unable to support themselves to leave the country and ‘make their way home.’<sup>139</sup> However, for many temporary visa holders in Australia, leaving simply is not an option, particularly for the thousands of stateless people in Australia who have no country to return to.<sup>140</sup>

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<<https://www.demorgen.be/nieuws/300-mensen-zonder-papieren-vrijgelaten-coronavirus-zet-dvz-onder-druk~bf3d626d/?referer=https%3A%2F%2Fpursuit.unimelb.edu.au%2Farticles%2Fdetention-increases-covid-19-health-risk>>; Diane Taylor, ‘Home Office Releases 300 from Detention Centres amid Covid-19 Pandemic’, *The Guardian* (online, 22 March 2020) <<https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>>.

<sup>133</sup> Commonwealth Ombudsman, ‘Statement by the Commonwealth Ombudsman Michael Manthorpe on the Management of COVID-19 Risks in Immigration Detention Facilities’ (Media Release, 1 June 2020)

<[https://www.ombudsman.gov.au/data/assets/pdf\\_file/0013/111235/1-July-2020-Statement-by-the-Commonwealth-Ombudsman-Michael-Manthorpe-on-the-management-of-COVID-19-risks-in-immigration-detention-facilities.pdf](https://www.ombudsman.gov.au/data/assets/pdf_file/0013/111235/1-July-2020-Statement-by-the-Commonwealth-Ombudsman-Michael-Manthorpe-on-the-management-of-COVID-19-risks-in-immigration-detention-facilities.pdf)>.

<sup>134</sup> Ibid 2.

<sup>135</sup> Ibid 6.

<sup>136</sup> Michelle Foster and Katie Robertson, ‘Detention Increases COVID-19 Health Risk’, *Pursuit* (17 April 2020)

<<https://pursuit.unimelb.edu.au/articles/detention-increases-covid-19-health-risk>>.

<sup>137</sup> Department of Home Affairs (Cth), Australian Border Force, *Immigration Detention and Community Statistics Summary* (29 February 2020) 4 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-29-february-2020.pdf>>.

<sup>138</sup> Katie Robertson, ‘What About Those Left Out by the Stimulus Package?’ *Pursuit* (7 May 2020)

<<https://pursuit.unimelb.edu.au/articles/what-about-those-left-out-by-the-stimulus-package>>.

<sup>139</sup> Ben Doherty, ‘Victoria Latest State to Help Temporary Migrants Excluded from Federal Coronavirus Support’, *The Guardian* (online, 30 April 2020) <<https://www.theguardian.com/australia-news/2020/apr/30/victoria-latest-state-to-help-temporary-migrants-excluded-from-federal-coronavirus-support>>.

<sup>140</sup> Katie Robertson, ‘What About Those Left Out by the Stimulus Package?’ *Pursuit* (7 May 2020)

<<https://pursuit.unimelb.edu.au/articles/what-about-those-left-out-by-the-stimulus-package>>.

- 78 In May 2020, more than 180 Australian community organisations issued a joint call for the Government to ensure all people have access to Medicare, and for the eligibility criteria for the unemployment benefit payment to be extended to bridging visa holders currently excluded from financial support.<sup>141</sup>
- 79 Community concerns over the public health risk associated with failing to support all people in Australia during this crisis are not unfounded. Evidence suggests that when people lack the ability to pay for food or rent, they are likely to move into overcrowded housing, which poses a greater risk for COVID-19 infection.<sup>142</sup>
- 80 Undocumented workers or those on insecure temporary visas (including stateless persons) are also much less likely to seek medical help, even if they are unwell, for fear of being reported to immigration authorities.<sup>143</sup>
- 81 Access to medical care is further complicated by the fact that many asylum seekers are excluded from Medicare benefits.<sup>144</sup> According to RCA, people without Medicare cards are likely to face significant obstacles to testing and treatment.<sup>145</sup>
- 82 As noted by Robertson, Australia cannot afford to ignore the needs of temporary visa holders, including stateless persons, in the national response to COVID-19.<sup>146</sup> Ensuring all members of the community, including stateless persons, can stay safe and are financially supported is consistent with good public health policy.<sup>147</sup>

## Recommendations

- 83 Based on the above analysis, the co-submitting organisations urge reviewing States to make the following recommendations to Australia:
- (a) Fully promote, respect, protect and fulfil its obligations towards stateless persons and the right to a nationality under international human rights law;
  - (b) Develop and introduce a legislative statelessness determination procedure, ensuring that the procedure is fair, effective and accessible to all persons in Australia regardless of their legal status. This includes funded access to interpreting services and legal support. The procedure should comply with international standards of due process and follow the procedural safeguards outlined in UNHCR’s Handbook on Protection of Stateless Persons;

<sup>141</sup> Refugee Council of Australia, ‘Open Letter to Prime Minister Scott Morrison – Nobody Left Behind’ (Web Page, 7 May 2020) <<https://www.refugeecouncil.org.au/open-letter-covid/>>.

<sup>142</sup> Katie Robertson, ‘What About Those Left Out by the Stimulus Package?’ *Pursuit* (7 May 2020) <<https://pursuit.unimelb.edu.au/articles/what-about-those-left-out-by-the-stimulus-package>>; Bianca Hall and Angus Thompson, ‘Plea for 1.1 Million on Temporary Visas as Expert Warns of Public Health Disaster’, *Sydney Morning Herald* (online, 4 May 2020) <<https://www.smh.com.au/national/plea-for-1-1-million-on-temporary-visas-as-expert-warns-of-public-health-disaster-20200430-p54op9.html>>.

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

<sup>144</sup> Katie Robertson, ‘What About Those Left Out by the Stimulus Package?’ *Pursuit* (7 May 2020) <<https://pursuit.unimelb.edu.au/articles/what-about-those-left-out-by-the-stimulus-package>>.

<sup>145</sup> Refugee Council of Australia, ‘Open Letter to Prime Minister Scott Morrison – Nobody Left Behind’ (Web Page, 7 May 2020) <<https://www.refugeecouncil.org.au/open-letter-covid/>>.

<sup>146</sup> Katie Robertson, ‘What About Those Left Out by the Stimulus Package?’ *Pursuit* (7 May 2020) <<https://pursuit.unimelb.edu.au/articles/what-about-those-left-out-by-the-stimulus-package>>.

<sup>147</sup> *Ibid.*

- (c) Develop and introduce a dedicated visa category for all stateless persons, regardless of their mode of arrival in Australia, providing them with permanent protection and a pathway to naturalisation;
- (d) Ensure that its treatment of stateless persons, including those in immigration detention fully complies with its international obligations, and that alternatives to detention are implemented to protect against arbitrary detention in all circumstances;
- (e) Introduce legislated maximum timeframes and independent review mechanisms for immigration detention, in accordance with international law;
- (f) Protect everyone's right to a nationality, and ensure that national laws comply with international obligations which prohibit the arbitrary deprivation of nationality and discrimination, while ensuring the avoidance of statelessness;
- (g) Amend the existing citizenship deprivation laws in the *Australian Citizenship Act 2007* (Cth) to ensure they are fully compliant with international law;
- (h) Ensure that the *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* is not be passed in its current form;<sup>148</sup>
- (i) Follow the advice of medical and human rights experts and remove persons, including stateless persons, from closed immigration detention facilities; and
- (j) Extend Medicare benefits, and COVID responsive social security measures to all bridging visa and temporary visa holders in Australia, including stateless persons.

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<sup>148</sup> *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Cth).