



Refugee Council
of Australia



STATELESSNESS IN AUSTRALIA

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ACRONYMS

AAT	Administrative Appeals Tribunal
RCOA	Refugee Council of Australia
RPBV	Removal Pending Bridging Visa
TPV	Temporary Protection Visa
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency

Cover photo: A mother from northern Lebanon holds her citizenship document. Her husband is stateless and her children have not acquired Lebanese nationality because women are unable to pass on nationality to their children.
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1. INTRODUCTION

The right to a nationality is a fundamental human right, enshrined in Article 15 of the Universal Declaration of Human Rights. Having a nationality also facilitates the enjoyment of many other human rights, often being a prerequisite for taking part in political life of your country (including through standing for or voting in elections), diplomatic protection, travelling both within and between countries and accessing essential services such as health care and education.

Those who do not have a nationality are referred to as stateless people. Stateless people are generally unable to exercise the rights associated with citizenship or face serious difficulties in doing so. They are typically excluded from political processes, cannot travel freely and lack access to publicly-funded services such as education, health care and social security. They often face difficulty in obtaining identity documents and securing employment and may be detained due to their lack of status. Stateless people are also vulnerable to exploitation and abuse due to their lack of status.

This Refugee Council of Australia (RCOA) report focuses on the situation of stateless people in Australia. It provides background information on the situation of stateless people worldwide an overview of issues and challenges faced by stateless people in Australia. It also includes a series of recommendations for improving protection for stateless people in Australia and ensuring that our international obligations towards stateless people are effectively upheld.

2. BACKGROUND

2.1. Definitions of statelessness

The 1954 Statelessness Convention Relating to the Status of Stateless Persons defines a stateless person as someone who “is not considered as a national by any State under the operation of its law.”¹ This definition is often referred to as *de jure* (in law) statelessness, in that it focuses not on whether an individual has a nationality that is effective but rather whether or not an individual has a nationality at all.

By contrast, people who are *de facto* (in fact) stateless may possess a nationality but cannot in practice exercise or enjoy their citizenship rights. While *de facto* stateless people may not meet the definition above, the Final Act of the 1961 Convention on the Reduction of Statelessness recommends that “persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality”.²

2.2. Causes of statelessness

Statelessness can occur for a multitude of reasons. In some cases, statelessness is caused by flawed or inadequate processes for granting nationality, such as gaps or discrimination in citizenship laws, a lack of effective birth registration procedures, failure to grant citizenship to all residents when one country succeeds from another or becomes independent, a lack of documentation or administrative barriers. For example, the citizenship laws of some countries bar women from passing on their nationality to their children, placing children at risk of statelessness if they are born out of wedlock, if their father is unknown or is not a citizen of their country or if their parents separate.

In circumstances such as those described above, statelessness is typically unintentional. In other circumstances, however, statelessness occurs because governments adopt policies or introduce laws which expressly aim to render certain individuals or groups stateless, either through revoking their citizenship or preventing them from attaining citizenship. One example is Burma’s 1982 Citizenship Law, which restricts full citizenship to people who belong to one of the “national races” or whose ancestors settled in Burma before the beginning of British occupation in 1823. The Rohingya were excluded from the list of “national races” and, because of the absence of historical records, few Rohingya are able to provide conclusive evidence of their lineage or a family history of residence in Burma prior to 1823.³

Statelessness may also be inherited. If one or both of a child’s parents are stateless, there is a risk that that child may also become stateless if they cannot inherit citizenship from one of their parents or obtain the citizenship of the country in which they were born. As noted by the Institute on Statelessness and Inclusion, “this means that most new cases of statelessness affect children, from birth, such that they may never know the protection of nationality. It also means that stateless groups suffer from intergenerational marginalisation and exclusion, which affects the social fabric of entire communities.”⁴

Whether it occurs unintentionally or by design, statelessness (as noted by the United Nations High Commissioner for Refugees, UNHCR) is “largely avoidable, and with adequate political will, entirely solvable too.”⁵

2.3. Impacts of statelessness

As noted by the Institute on Statelessness and Inclusion, “The harsh reality for many stateless persons is a story of lack of opportunity, of lack of protection and of lack of participation.” Without a nationality, they

¹ 1954 Convention Relating to the Status of Stateless Persons, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatelessPersons.aspx>

² 1961 Convention on the Reduction of Statelessness, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Statelessness.aspx>

³ Human Rights Watch (2000). *Burmese refugees in Bangladesh: Still no durable solution*. <http://www.hrw.org/reports/2000/burma/index.htm>

⁴ Institute on Statelessness and Inclusion (2014). *The World’s Stateless*. <http://www.institutesi.org/worldsstateless.pdf>, p. 27

⁵ United Nations High Commissioner for Refugees (UNHCR) (2014). *Ending Statelessness Within 10 Years*. http://unhcr.org/statelesscampaign2014/Stateless-Report_eng_final3.pdf, p. 6

are generally unable to exercise the rights associated with citizenship or face serious difficulties in doing so.

Stateless people are typically excluded from political processes, with the rights to vote and stand for public office often being restricted to citizens. They may lack access to publicly-funded services such as education, health care and social security and be denied the right to work legally. Stateless people often face serious difficulties in obtaining identity documents of any kind, with the result that they “have no proof that they exist and no means by which to identify themselves in their day-to-day interactions with the state or with private entities.” As such, what should be simple processes such as buying property, getting married, registering a car or a business, opening a bank account or applying for a loan can be very arduous for stateless people, if not entirely inaccessible.⁶ Lack of identity documentation can also seriously limit freedom of movement both within and between countries.

Many stateless people also experience significant discrimination and marginalisation due to their lack of citizenship and are often at risk of exploitation and abuse, including forcible eviction, expulsion and human trafficking.⁷ Stateless people may also be detained due to their lack of status and could face indefinite detention for prolonged periods if their status cannot be resolved. This is a particularly significant risk for stateless people who travel outside their country of origin (for example, to seek asylum): if they cannot be easily repatriated due to their lack of nationality, they may remain in immigration detention indefinitely.

At a personal level, the experience of being stateless can have serious negative impacts on mental health and wellbeing, being associated with “a diminished sense of self-worth and in some cases a confused sense of identity and belonging [which] can prompt sentiments of hopelessness, anxiety and depression.”⁸

2.4. Stateless people worldwide

The United Nations High Commissioner for Refugees (UNHCR) estimates that at least 10 million people worldwide do not have a nationality are affected by statelessness; however, only 3.5 million of these people have been formally identified.⁹

Of the 21 countries worldwide that reported a figure of over 10,000 stateless people, seven are in Europe, seven in Asia and the Pacific, four in the Middle East and North Africa, two in Africa and one in the Americas. Asia and the Pacific has the largest documented number of stateless people of any region (1,509,696).

*Stateless people by region, end 2014*¹⁰

Region	No. of stateless people
Asia and the Pacific	1,509,696
Africa	721,418
Europe	605,689
Middle East and North Africa	444,230
Americas	211,230
Total	3,469,370

⁶ Institute on Statelessness and Inclusion 2014, pp. 28-30

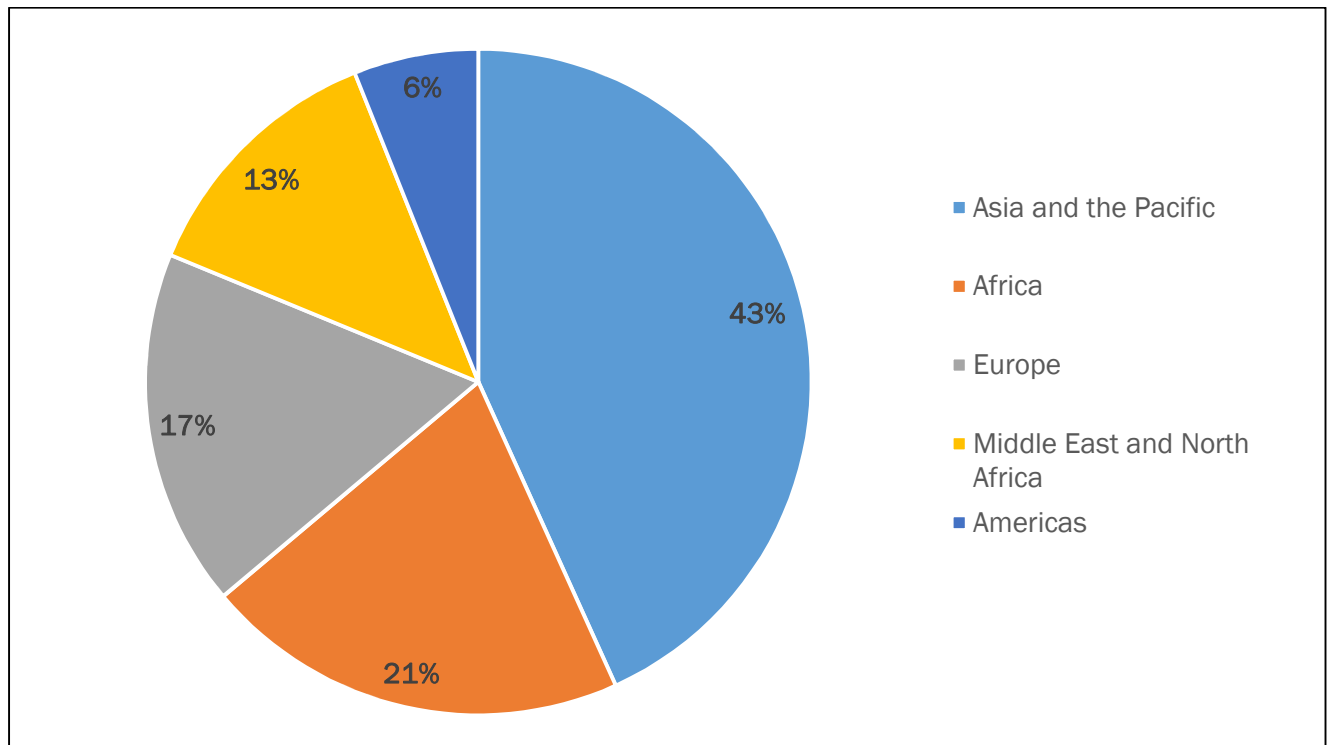
⁷ UNHCR 2014, *Ending Statelessness Within 10 Years*, p. 19

⁸ Institute on Statelessness and Inclusion 2014, p. 31

⁹ UNHCR (2015). *Global Trends 2014*. <http://www.unhcr.org/556725e69.html>, p. 36

¹⁰ UNHCR 2015, *Global Trends 2014*. Based on regional definitions used by UNHCR Bureaux.

Stateless people by region, end 2014¹¹



Countries hosting >10,000 stateless people, end 2014¹²

Country	No. stateless people	Details
Burma	810,000	Rohingya rendered stateless by 1982 Citizenship Law
Côte d'Ivoire	700,000	Migrants of Burkinabé descent who were not eligible for citizenship after independence from France
Thailand	506,197	"Hill tribe" people from various ethnic groups
Latvia	262,802	People left stateless after the break-up of the Soviet Union
Dominican Republic	210,000	People of Haitian origin or descent affected by retroactive changes to nationality criteria
Syria	160,000	Kurdish people rendered stateless by 1962 census exercise
Iraq	120,000	Faili Kurds rendered stateless by 1980 decree stripping nationality from people "of foreign origin" considered disloyal to the country
Russia	113,474	People left stateless after the break-up of the Soviet Union
Kuwait	93,000	Bidoon people who failed to register when Gulf states first developed nationality laws
Estonia	88,076	People left stateless after the break-up of the Soviet Union
Uzbekistan	86,703	People left stateless after the break-up of the Soviet Union
Saudi Arabia	70,000	Bidoon people who failed to register when Gulf states first developed nationality laws
Malaysia	40,000	Ethnic Indians (mainly Tamils) brought to Malaysia several generations ago under British rule
Ukraine	35,335	People left stateless after the break-up of the Soviet Union
Sweden	27,167	Primarily arises in a migration context

¹¹ UNHCR 2015, *Global Trends 2014*. Based on regional definitions used by UNHCR Bureaux.

¹² Compiled from UNHCR 2015, *Global Trends 2014*; Institute on Statelessness and Inclusion 2014; International Observatory on Statelessness country profiles, available at <http://www.nationalityforall.org>

Brunei Darussalam	20,524	Ethnic Chinese
Kenya	20,000	Members of minority groups
Kyrgyzstan	12,133	People left stateless after the break-up of the Soviet Union
Germany	11,917	Primarily arises in a migration context but also affects a significant number of German-born people
Vietnam	11,000	Ethnic Chinese Cambodians and Vietnamese women who renounced citizenship after marrying a foreign national
Poland	10,825	Primarily arises in a migration context

In addition to the stateless people under UNHCR's mandate, there are a further 5.1 million stateless Palestinian refugees who were displaced by the conflict which followed the creation of Israel in 1948. These stateless people fall under the mandate of the United Nations Relief and Works Agency (UNRWA).

2.5. Statelessness in international law

There are two key international legal instruments relating to stateless people. The first is the 1954 Convention relating to the Status of Stateless Persons, which (in a similar manner to 1951 Convention Relating to the Status of Refugees) defines who a stateless person is and outlines the rights which should be afforded to stateless people. It requires signatories to grant stateless people:

- The same rights as citizens in relation to freedom of religion, intellectual property, access to courts and legal assistance, rationing, access to primary education, public relief, labour rights and social security.
- Treatment which is as favourable as possible and at least as favourable as that accorded to foreign nationals, in relation to the acquisition of property, freedom of association, access to employment, self-employment, housing and access to secondary and tertiary education.
- Treatment which is at least as favourable as that accorded to foreign nationals in relation to freedom of movement.

The 1954 Convention also prohibits signatories from expelling a stateless person lawfully in their territory except on grounds of national security or public order.

The second key instrument is the 1961 Convention on the Reduction of Statelessness, which outlines a range of measures to prevent statelessness. These measures fall into four main categories:

- *Prevention of statelessness among children* by requiring states parties to grant nationality to children who would otherwise be stateless and have ties with the state either through birth in its territory or through descent from a national of that state.
- *Prevention of statelessness caused by loss or renunciation of nationality* by requiring that the loss or renunciation of nationality be conditional on the possession or acquisition of another nationality.
- *Prevention of statelessness caused by deprivation of nationality* by prohibiting deprivation of nationality if it would result in statelessness and prohibiting deprivation of nationality on racial, ethnic, religious or political grounds.
- *Prevention of statelessness caused by state succession* by requiring that, in cases where there is transfer of territory resulting from one state replacing (or "succeeding") another in responsibility for a territory, special provision is made for persons who could be made stateless by the transfer.

The 1954 Convention has been ratified or acceded to by 86 countries and signed but not yet ratified by a further 23. The 1961 Convention has been ratified or acceded to by 63 countries and signed by five.

2.6. Global efforts to address statelessness

In 2011, to mark the 60th anniversary of the 1951 Refugee Convention and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, UNHCR organised a ministerial meeting in Geneva attended by representatives of 155 UN member states. In the lead-up to the event, UNHCR requested that governments make pledges that would enhance the protection of refugees and stateless people. More than 90 countries made pledges focusing on a range of issues including the protection of women and children and the achievement of durable solutions for refugees.

Perhaps the most significant outcome of this meeting was the commitment by a large number of countries to take steps to improve protection for stateless people. A total of 62 countries made statelessness-related pledges, including commitments to: accede to one or both of the two Statelessness Conventions or take steps to accede; undertake law reform to prevent or reduce statelessness; implement better civil registration and documentation systems to prevent and reduce statelessness; establish statelessness determination procedures or to take steps towards establishing such procedures; undertake studies, mapping initiatives or awareness-raising campaigns to better understand and address statelessness in their countries; address statelessness through foreign policy initiatives; and respect for international principles and action on statelessness.¹³

At the conclusion of the meeting, United Nations High Commissioner for Refugees, António Guterres, commented that “I am especially heartened by the real breakthrough – what I would describe as a ‘quantum leap forward’ – in relation to the protection of stateless people.”¹⁴ Following the meeting, 22 countries acceded to one or both of the Conventions and Hungary and Mexico both recently withdrew their reservations to the 1954 Convention.¹⁵

In 2014, to commemorate the 60th anniversary of the 1954 Statelessness Convention, and to acknowledge and address the plight of the 25,000 people who have been in a protracted stateless situation for over a decade, UNHCR launched a global campaign aiming to eliminate statelessness within a decade. Key elements of the campaign include: an integrated media strategy aiming to “highlight the plight of stateless people and promote action to address statelessness” (including the online #IBELONG campaign¹⁶); a series of consultations with stateless people around the world, to gather information and produce a series of storytelling videos to “present the human face of statelessness”; a series of country and regional meetings with governments, regional organisations and other partners to promote improved protection for stateless people; publishing a series of good practices papers on identification, prevention and reduction of statelessness and protection of stateless people; and organising the First Global Forum on Statelessness, which was held in September 2014 in The Hague and brought together international institutions, government representatives, academics, stateless people and NGOs to present research on, responses to and experiences of statelessness.¹⁷

More recently, El Salvador and Turkey have acceded to the 1954 Statelessness Convention and 25 countries in the West Africa region have begun to take defined steps in eliminating statelessness in cooperation with UNHCR.¹⁸

2.7. Stateless people and refugees

The 1954 Statelessness Convention was originally intended to be a protocol to the 1951 Refugee Convention but was ultimately developed into an independent Convention. While the two Conventions share a similar structure and function – to formally define groups in need of international assistance and outline the rights which should be afforded to these groups – there are important distinctions between them.

¹³ UNHCR (2012). “Pledges 2011”. *Ministerial Intergovernmental Event on Refugees and Stateless Persons*. Geneva, Switzerland: 4-8 December 2011. <http://www.refworld.org/docid/50aca6112.html>

¹⁴ UNHCR 2012, p. 6.

¹⁵ Türk, V. (2014). “The status of statelessness 60 years on”. *Forced Migration Review*, 46: 46-8.

¹⁶ See <http://ibelong.unhcr.org>

¹⁷ UNHCR (2014). *A Campaign to End Statelessness*. <http://www.unhcr.org/53174df39.html>

¹⁸ UNHCR (2015). *State Action on Statelessness*. <http://www.unhcr.org/pages/4ff2bdff6.html>.

The purpose of the Refugee Convention is to provide a framework for protecting people with a well-founded fear of persecution and as such includes specific forms of protection for people in this situation. For instance, the Refugee Convention prohibits signatories from imposing penalties on refugees who enter or are present in their territory without authorisation and from returning a refugee to a situation where they may be at risk of persecution. Both forms of protection are absent from the 1954 Statelessness Convention, which instead aims to provide a framework for assisting people who lack a nationality and are not necessarily at risk of persecution.

While not all stateless people are refugees, statelessness can be a root cause of forced displacement and many stateless groups face harassment, discrimination and human rights violations which would amount to persecution under the Refugee Convention. The Rohingya people of Burma, the Faili Kurds of Iraq and Iran and the Nepalese-speaking people of Bhutan are all examples of groups which are both stateless and typically eligible for protection under the Refugee Convention.

If a person is both stateless and a refugee, it is recommended that their refugee status should take precedence over the status as a stateless person with regards to the level of protection and assistance they should be afforded. In 2010, an Expert Meeting convened by UNHCR on stateless people and international law concluded that:

If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be the standard of treatment foreseen under international refugee law (supplemented by international human rights law). Thus, where a stateless individual qualifies for asylum as a refugee under national law and this is more favourable in substance compared to the immigration status awarded to stateless persons, States should accord such individuals refugee status or the rights which flow from such status.¹⁹

¹⁹ UNHCR (2010). "Summary Conclusions". *Expert Meeting: The Concept of Stateless Persons under International Law*. Prato, Italy: 27-8 May 2010. <http://www.refworld.org/docid/4ca1ae002.html>. Referred to as the "Prato Conclusions".

3. STATELESSNESS IN AUSTRALIA

Australia acceded to the 1954 and 1961 Statelessness Conventions in 1973 and thus has obligations to afford stateless people certain rights and entitlements and implement measures to prevent and reduce statelessness. Australia is also party to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination, international treaties which affirm the right of children to acquire a nationality and prohibit discrimination in the granting of nationality. The Convention on the Rights of the Child also requires signatories to intervene in a situation where a child is at risk of statelessness.

However, the extent to which these obligations are reflected in Australia's current laws and policies varies. While some of Australia's obligations towards stateless people are enshrined in legislation, others have not been incorporated into law and mechanisms for resolving and preventing statelessness and providing protection and assistance to stateless people remain inadequate. This section provides an overview of some of the key issues and challenges faced by stateless people in Australia.

3.1. Stateless people in Australia

The primary means through which stateless people gain residence in Australia is through the Refugee and Humanitarian Program. Between 2009-10 and 2013-14, 3,482 stateless people received permanent residency in Australia, of whom 3,156 (91%) were granted visas under the Refugee and Humanitarian Program. More than half of the stateless people granted permanent residency under the Refugee and Humanitarian Program were recognised as refugees after arriving as asylum seekers, while the remainder were resettled from overseas.

Stateless people granted permanent residency in Australia, 2009-10 to 2013-14²⁰

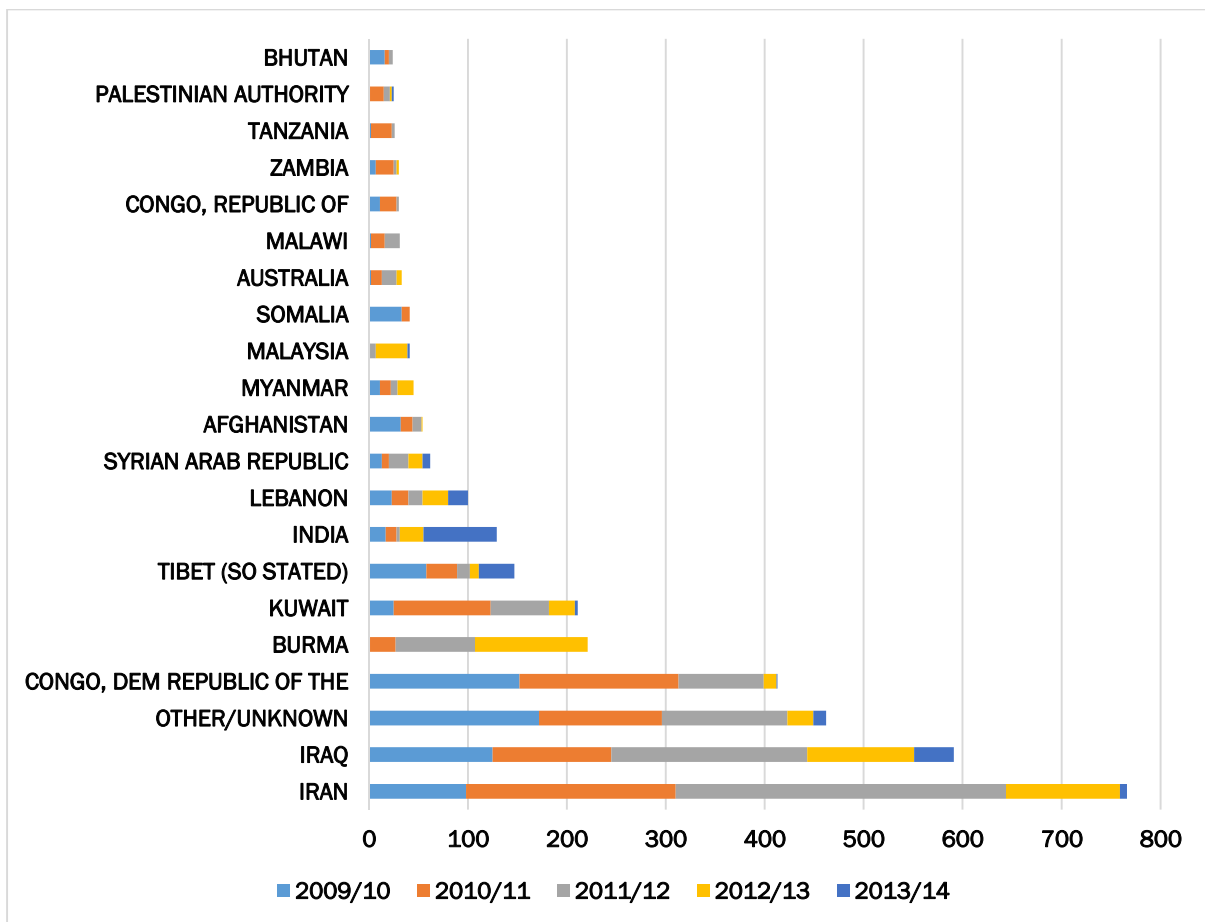
Visa subclass	2009-10	2010-11	2011-12	2012-13	2013-14	TOTAL
<i>Refugee and Humanitarian Program</i>						
200	283	184	150	46	30	693
202	166	161	20	29	118	494
204	58	59	9	5	0	131
817	0	0	1	0	0	1
866	227	479	751	379	1	1,837
Total	734	883	931	459	149	3,156
<i>Family migration stream</i>						
100	24	25	27	40	12	128
101	6	0	2	1	2	11
102	1	0	2	2	2	7
103	0	1	0	0	3	4
115	0	1	0	0	0	1
116	4	0	4	1	0	9
117	9	2	2	4	0	17
143	1	2	2	0	0	5
300	0	0	2	1	1	4
309	3	1	3	6	23	36
801	11	19	13	1	0	44
802	0	1	0	0	0	1
820	1	0	9	12	13	35
Total	60	52	66	68	56	302
<i>Skilled migration stream</i>						
119	0	1	1	0	0	2
136	3	0	0	0	0	3
175	0	0	1	3	0	4
176	0	0	0	1	1	2

²⁰ Figures derived from the Department of Immigration and Border Protection's Settlement Reporting Facility, <http://www.immi.gov.au/settlement/srf>

186	0	0	0	1	0	1
485	1	0	2	0	0	3
845	0	0	2	0	0	2
856	1	0	1	0	0	2
857	1	1	0	0	0	2
892	2	0	0	0	0	2
Total	8	2	7	5	1	23
<i>Other</i>						
151	0	0	0	1	0	1
Grand total	802	937	1,004	533	206	3,482

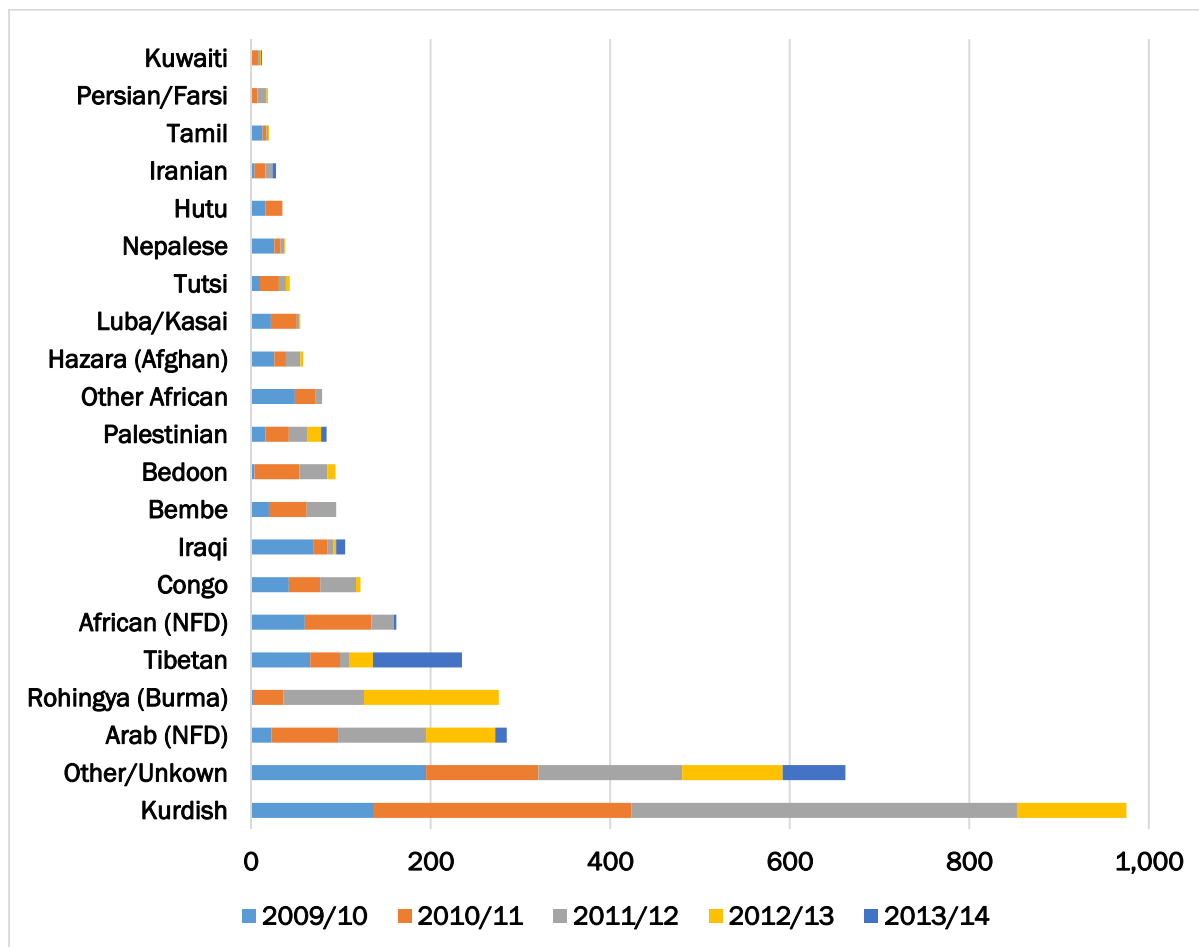
The most common countries of birth for stateless people granted permanent residency in Australia between 2009-10 and 2013-14 were Iran and Iraq, with Kurdish the most common ethnicity. Other common countries of birth included the Democratic Republic of the Congo, Burma, Kuwait, Tibet, India and Lebanon.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

Stateless people granted permanent residency by country of birth, 2009-10 to 2013-14²¹



²¹ Figures derived from the Department of Immigration and Border Protection's Settlement Reporting Facility, <http://www.immi.gov.au/settlement/srf>

Stateless people granted permanent residency by ethnicity, 2009-10 to 2013-14²²



3.2. Lack of a statutory statelessness status determination procedure

At the 2011 ministerial conference marking the 60th anniversary of the 1951 Refugee Convention and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, the Australian Government pledged to “better identify stateless persons and assess their claims”.²³ However, while the Government subsequently introduced guidelines to assist in identifying stateless people, Australia continues to lack a statutory statelessness status determination process.

A significant number of stateless people in Australia also have claims for protection under the Refugee Convention or on complementary grounds and can thus seek to have their status assessed through Australia’s statutory refugee status determination process, to which clear visa outcomes are attached. For stateless people who do not have protection claims, or are determined by the Australian Government not to be in need of protection, there is no statutory process for resolving their status. Furthermore, there is no clear visa outcome for people who are judged to be stateless on the basis of Government guidelines.

The lack of a statutory statelessness status determination process both hinders the identification of stateless people and hampers efforts to resolve their situation. Generally, people who are found not to be in need of Australia’s protection and are not eligible for any other kind of substantive visa are expected to return to their country of origin. Stateless people, however, typically cannot return to their country of origin even if they wish to do so. Unable to return home or travel elsewhere due to their statelessness, and ineligible for residency in Australia, they may find themselves effectively stranded.

²² Figures derived from the Department of Immigration and Border Protection’s Settlement Reporting Facility, <http://www.immi.gov.au/settlement/srf>

²³ UNHCR 2012, p. 49

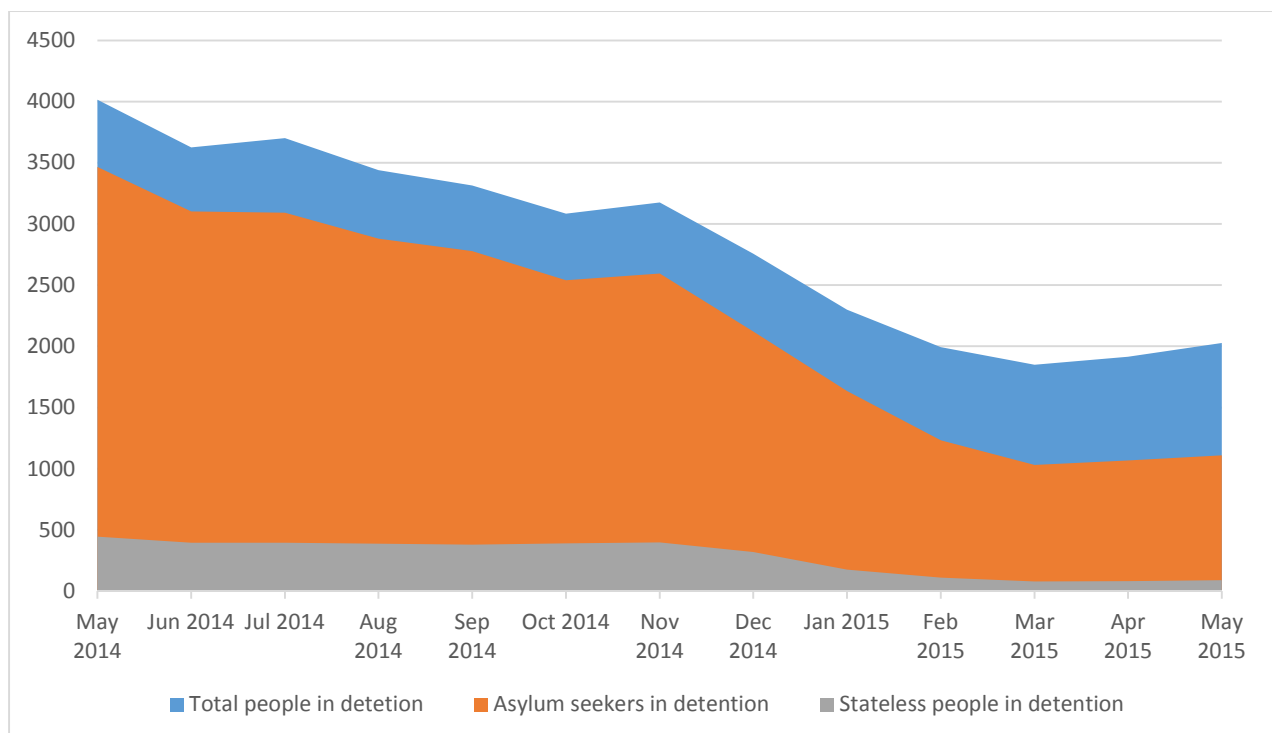
There are currently very few options available to stateless people in this situation. As with other visa applicants, stateless people can request the Minister for Immigration and Border Protection to personally intervene in their case and grant them a substantive visa. However, the Minister’s personal intervention powers are discretionary, non-compellable, non-delegable and non-reviewable. The Minister is under no obligation even to consider a request for intervention, let alone act on a request. Decisions made by the Minister regarding whether or not to consider requests or grant visas are not subject to review or appeal. As such, the Ministerial intervention process does not offer an effective or procedurally fair status resolution process for stateless people.

Stateless people who cannot secure residency in Australia or return to their country of origin may alternatively seek residency in a third country. This option relies largely on diplomatic negotiations and the willingness of third countries to accept stateless people as long-term residents. Such efforts, however, have typically had a very low rate of success. As the Australian Human Rights Commission has found, the “pursuit of third country residency options has historically left people who are stateless in situations of protracted immigration detention.”²⁴ If both the Ministerial intervention and third country residency options fail, stateless people have no other means of resolving their status or securing long-term residency in Australia or elsewhere.

3.3. Immigration detention

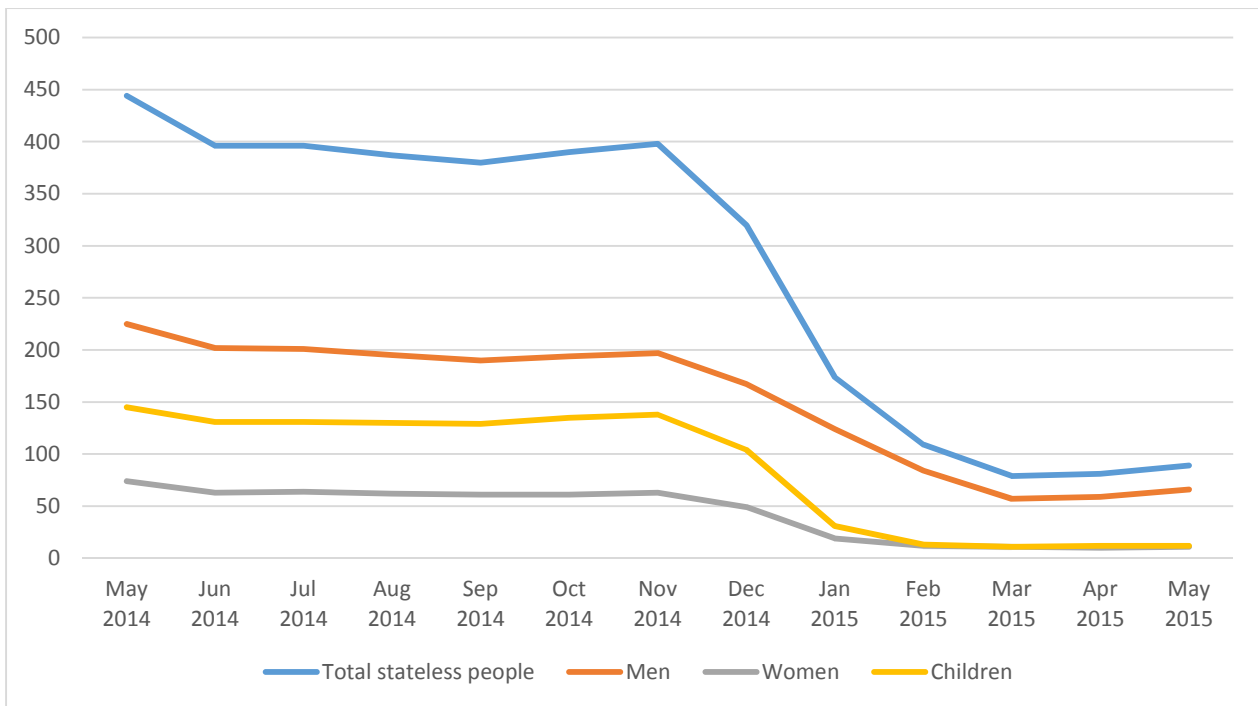
Australia’s inadequate mechanisms for resolving the status of stateless people places this group at particularly high risk of prolonged indefinite immigration detention. Under Australia’s *Migration Act 1958*, non-citizens who do not have a valid visa must be detained until they are either granted a visa or leave the country. There is no time limit on immigration detention under Australian law, with the result that people can be held in detention for very long periods of time (theoretically for the course of their natural lives).

Stateless people in immigration detention, May 2014 to May 2015²⁵



²⁴ Australian Human Rights Commission (2012). *Community Arrangements for Asylum Seekers, Refugees and Stateless Persons*. www.humanrights.gov.au/human_rights/immigration/2012community-arrangements, p. 33

²⁵ Figures from the Department of Immigration and Border Protection’s monthly Immigration Detention and Community Statistics Summaries, available at <http://www.border.gov.au/Busi/Comp/Immigration-detention>



Because stateless people are typically unable to return to their country of origin, those who are deemed ineligible for an Australian visa may remain in immigration detention indefinitely. This risk was infamously highlighted in the case of *Al-Kateb v Godwin*,²⁶ which concerned a stateless Palestinian man who had arrived in Australia by boat to seek protection. Mr Al-Kateb was found not to be a refugee but could not be returned to his country of origin. Despite the fact that there was no prospect of Mr Al-Kateb being removed from Australia in the foreseeable future, the High Court found that it was permissible under the *Migration Act 1958* to detain a person indefinitely. While Mr Al-Kateb was eventually released, stateless people continue to face the risk of being detained for extended periods if their status cannot be easily resolved.

3.4. Removal Pending Bridging Visas

Stateless people who have exhausted all options for securing residency in Australia may be granted a Removal Pending Bridging Visa (RPBV) as an alternative to indefinite immigration detention. RPBVs are designed for people who have been cooperating with the Government to resolve their immigration status and removal from Australia but whose removal is not currently feasible.²⁷ RPBVs were introduced in 2005 and are granted through the discretionary, non-compellable Ministerial intervention process, meaning that the decision as to whether or not to grant someone a RPBV lies solely with the Minister and cannot be reviewed.

RPBV holders must adhere to regular reporting requirements and continue to cooperate with preparations for their removal from Australia. They are permitted to work, have access to Medicare and can receive torture and trauma counselling. School-aged children have access to primary and secondary education. However, RBPV holders have limited access to income support, are not eligible for higher education loan schemes (which can effectively exclude them from tertiary education), do not have access settlement services (including free English language tuition) and cannot travel outside Australia without forfeiting their visa.

While the granting of an RPBV is preferable to indefinite detention, it fails to provide an adequate solution for stateless people. Indeed, it makes little sense to grant a “removal pending” visa to a person who has no foreseeable prospect of being removed from Australia. In the absence of any other visa option that is

²⁶ *Al-Kateb v Godwin* (2004) HCA 37, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2004/37.html>

²⁷ See the Department of Immigration and Border Protection (2011). *Fact Sheet 85: Removal Pending Bridging Visas*. <https://www.immi.gov.au/media/fact-sheets/85removalpending.htm>

better suited to their circumstances, stateless people may struggle to get by for years in the Australian community without access to adequate services and support and without any hope of their situation being sustainably resolved.

3.5. Arrival without valid documentation

As noted by UNHCR, “statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess.”²⁸ As a result, stateless people are likely to face significant and possibly insurmountable challenges in securing the necessary documentation to facilitate travel through authorised channels. For this reason, they may be compelled to travel to other countries without valid documentation, in turn placing them at risk of penalisation for unauthorised entry.

Australia currently applies a range of punitive measures to asylum seekers (stateless or otherwise) who arrive without valid documentation, with the stated aim of deterring unauthorised arrival. These measures include: denial of entry to Australia; offshore detention and processing in Nauru and Papua New Guinea; denial of access to permanent residency in Australia; ineligibility for some settlement services; and restrictions on access to family reunion opportunities. While these measures have negative consequences for all asylum seekers, their impact on stateless people could be particularly significant. For example, there are currently no processes in place in either Nauru or Papua New Guinea for identifying and resolving the status of stateless people, meaning that they may face indefinite detention under particularly harsh conditions. In addition, the denial of permanent residency to people in this situation is premised on an assumption that they will eventually be able to return to their country of origin – an unlikely prospect for most refugees but an impossibility for stateless people.

3.6. Babies born in Australia to stateless parents

Under the *Australian Citizenship Act 2007*, children who are born in Australia do not automatically acquire Australian citizenship. They will only be granted Australian citizenship if at least one of their parents is an Australian citizen or permanent resident at the time of their birth. Otherwise, a child born in Australia is automatically granted citizenship after residing in Australia for 10 years.²⁹

The *Citizenship Act* also provides that children who are who born in Australia, are not and have never been citizens of any country and are not entitled to acquire the citizenship of another country – that is, children who would otherwise be stateless – must be granted Australian citizenship. While these requirements are stricter than those set out in the 1954 Statelessness Convention, this provision nonetheless provides a means of resolving the situation of children born in Australia who would otherwise be stateless. Moreover, there is no discretion for the Minister for Immigration to refuse a citizenship application for a child in these circumstances.

In recent years, a number of children have been born in Australia to parents who arrived in Australia by boat and are therefore subject to deterrence measures such as offshore processing and denial of access to permanent residency. As a result of legislative amendments introduced in late 2014,³⁰ these children are considered, like their parents, to be “unauthorised maritime arrivals” – despite the fact that they did not themselves arrive in Australia by boat – and are therefore subject to the same punitive policies as their parents. These changes apply retrospectively, meaning that they will affect children who were born before the amendments were introduced.³¹

However, children born under these circumstances whose parents are stateless should be eligible for Australian citizenship under the *Citizenship Act*, meaning that they would not be subject to these policies. As yet, neither the current Minister for Immigration nor his predecessor have acted on their obligations to

²⁸ UNHCR (2014). *Handbook on Protection of Stateless Persons*. <http://www.refworld.org/docid/53b676aa4.html>, p. 40

²⁹ *Australian Citizenship Act 2007* (Cth) s 12, http://www.austlii.edu.au/au/legis/cth/consol_act/aca2007254

³⁰ Under the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5346

³¹ As part of the negotiations to pass the legislation, however, the Australian Government agreed that a number of the children affected by this change who would otherwise have been subject to offshore processing, would instead have their claims processed in Australia.

grant citizenship to these children citizenship, despite the fact that they have no discretion to refuse them citizenship. Given that these children are unambiguously eligible for Australian citizenship, the reasons for this delay remains unclear.

3.7. Family separation

The limited family reunion opportunities available to refugee and humanitarian entrants to Australia, and the specific restrictions on access to these opportunities applied to people who arrived in Australia by boat, has resulted in indefinite and often prolonged separation of families. There is a risk that this family separation could result in some children becoming stateless. For example, children born overseas in countries where citizenship is conferred on the basis of the father's nationality may become stateless if their father is not present at the time of their birth.

3.8. Barriers to citizenship

Stateless people who are granted permanent residency in Australia are not automatically eligible for Australian citizenship. Under the *Australian Citizenship Act 2007*, permanent residents can become naturalised citizens of Australia once they have resided lawfully in Australia for a minimum of four years, including for at least 12 months as a permanent resident. Upon attaining Australian citizenship, formerly stateless people will have the right to vote, stand for elections and work in the Australian Public Service or Australian Defence Force. Australian citizenship also provides diplomatic protection when travelling outside of Australia, which can be especially significant for those wishing to visit family in their country of origin or other countries of asylum.

However, while stateless people who hold permanent visas may be eligible for citizenship under the criteria outlined above, they may face a number of barriers to obtaining citizenship. As noted above, the majority of stateless people in Australia arrived under the Refugee and Humanitarian Program. Unlike migrants, refugee and humanitarian entrants usually arrive in Australia with few or no possessions and financial assets and as such may face significant financial hardship during their early years of settlement in Australia. During RCOA's annual community consultations, concerns have been raised that citizenship application fees may be unaffordable for some refugee and humanitarian entrants, particularly if they have large families or have struggled to find stable employment. Fee concessions are available to people who receive certain types of income support but many income support recipients are not eligible for these concessions. For example, Health Care Card holders who receive the Newstart Allowance or Youth Allowance are not entitled to the concession rate.³²

In addition, people applying for citizenship must successfully complete the Australian Citizenship Test. The test consists of a set of 20 multiple choice questions in English, relating to Australian values, history, culture and the political system. For refugee and humanitarian entrants, who typically arrive in Australia with little or no English language skills and may have a history of disrupted education (or, indeed, may never have received formal education), the Citizenship Test can present a significant hurdle. In 2013-14, 92.4% of refugee and humanitarian entrants passed the citizenship test, compared to the overall success rate of 98.7%. In addition, some refugee and humanitarian entrants may choose not to attempt the test at all because they have not yet attained a sufficient level of English.

3.9. Recent and proposed legislation

A number of recent and proposed changes to Australia legislation have introduced further barriers to citizenship and weakened protection against statelessness. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* reintroduced Temporary Protection Visas (TPVs) for refugees who arrived in Australia as asylum seekers without valid documentation. TPV holders are not permitted to apply for permanent residency in Australia except at the discretion of the Minister. Given that permanent residency is a prerequisite for Australian citizenship, some TPV holders may never be eligible for Australian citizenship even if they reside in Australia for many

³² See current eligibility criteria for fee concessions at http://www.citizenship.gov.au/applying/fees_forms_appeals

years. Among the asylum seekers affected by this policy are a significant number of stateless people who, without a pathway to permanent residency, face the prospect of being permanently disenfranchised.

The *Australian Citizenship and Other Legislation Amendment Bill 2014*, currently before the Australian Parliament, aims to extend the good character requirements for citizenship, clarify residency requirements and extend powers relating to the cancellation, deferring and revoking of citizenship. There are serious concerns that the Bill, if passed, may restrict access to citizenship for some stateless people and result in individuals being rendered stateless through a revocation of their citizenship.

The Bill seeks to extend the Minister for Immigration's powers to revoke a person's citizenship on the basis of fraud or misrepresentation. If the Bill is passed, the only requirement which must be satisfied in order for the Minister to validly revoke citizenship on the basis of fraud or misrepresentation is that the Minister be satisfied that such fraud or misrepresentation has occurred. There is no requirement that a person be found guilty of fraud or even that evidence of fraud must exist. Essentially, the Bill would permit revocation of citizenship on the basis of the Minister's personal opinion alone. The Bill also specifically allows for a child's citizenship to be revoked due to the child's own acts of fraud or misrepresentation, even if doing so would render that child stateless. There is a serious risk that this amendment would allow for the revocation of citizenship on grounds which are not fair or reasonable, potentially resulting in innocent people (including children) becoming stateless.

The Bill also seeks to grant the Minister discretionary powers to overturn the findings of the Administrative Appeals Tribunal (AAT) and prevent merits review of decisions made personally by the Minister in the public interest. Thus, citizenship applications may be refused by the Minister simply because they are not in the "public interest" and such decisions will not be reviewable through the AAT. There is concern that this amendment could result in the denial of citizenship without due process, which could in turn prevent some stateless people from being able to fully resolve their status.

The *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, also currently before Parliament, seeks to introduce new provisions whereby dual national of Australia will automatically renounce their citizenship if they commit certain offences, including but not limited to terrorism-related offences. There is concern that these new provisions will apply to a broad range of offences, including some which may be entirely unrelated to national security and pose no threat to the life or safety of others (such as damaging Commonwealth property). In addition, the Bill fails to outline a clear standard of proof and procedure for establishing that someone has committed an act which would result in the renunciation of their citizenship. There is no requirement, for example, that a person must have been convicted of a relevant offence.

While this Bill is intended to apply only to dual nationals, there is still a concern that the automatic cessation of citizenship could render people *de facto* stateless. While a person may hold citizenship of another country in name, this does not mean that they can exercise those rights in fact. For example, many former refugees in Australia would remain nationals of their country of origin but, because of their well-founded fear of persecution or other serious harm, could not return there. As such, there is a risk that a dual national may become *de facto* stateless if their Australian citizenship ceases and they are unable to exercise their citizenship rights in another country. There is also concern that the families and children of people whose citizenship ceases under the proposed provisions may be in danger of losing their right of residency or even their citizenship of Australia, creating a further risk of statelessness.

4. CONCLUSION AND RECOMMENDATIONS

4.1. Status determination procedure

While Australia's current laws and policies do provide some forms of protection for stateless people, it is clear that far more could be done to prevent and resolve statelessness in Australia. Perhaps the most significant gap in Australia's protection of stateless people is the lack of a statutory statelessness status determination procedure, attached to a clear visa outcome. Without such a procedure in place, stateless people who are found not to be in need of Australia's protection face prolonged indefinite detention or a precarious existence on a temporary bridging visa. The primary recommendation of this report, therefore, is to establish a statelessness status determination procedure in Australia.

Recommendation 1

RCOA recommends that the Australian Government introduce a statelessness status determination procedure, in line with the proposed guidelines in the Appendix to this report.

Recommendation 2

RCOA recommends that people who are found not to be in need of Australia's protection but are determined to be stateless be eligible for the grant of a permanent Protection Visa.

4.2. Addressing de facto statelessness

While the introduction of a statelessness status determination procedure would assist in resolving the status of people who are *de jure* stateless, there is also a need to implement additional mechanisms to address the situation of people who are *de facto* stateless. In RCOA's view, the Australian Government should as far as possible seek to treat *de facto* stateless people in the same manner as *de jure* stateless people, so that they may gain access to effective citizenship.

Recommendation 3

RCOA recommends that:

- a) Australia's statelessness status determination procedure allow for consideration of both de jure and de facto statelessness.*
- b) Both de jure and de facto stateless people be entitled to eligible for the grant of a permanent Protection Visa.*

If the Australian Government does not wish to provide immediate permanent residency to people who are *de facto* stateless, it could consider adopting a model similar to that used by Mexico. To RCOA's knowledge, Mexico is the only country which currently has a formal mechanism in place for determining *de facto* statelessness.³³ Instead of being automatically granted permanent residency, *de facto* stateless people in Mexico receive a one-year "non-immigrant" status which provides work rights and internal freedom of movement. This status can be renewed four times. At the end of this period, the person can seek a more permanent immigration status.

Recommendation 4

Should Recommendation 3(b) not be implemented, RCOA recommends that the Australian Government grant a temporary substantive visa to people who are determined to be de facto stateless, with similar rights and entitlements to permanent Protection Visa holders and a clear pathway to permanent residency if the person's statelessness remains unresolved.

4.3. Protection from prolonged indefinite detention

One of the major risks faced by stateless people in Australia is prolonged indefinite immigration detention. While this risk stems in part from their inability to return to their country of origin, it is largely the result of

³³ The Equal Rights Trust (2010). Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons. <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>, p. 203.

Australia's detention policies. RCOA thus strongly encourages the Australian Government to reform the immigration detention system to prevent any person from being held in detention indefinitely for prolonged periods.

Recommendation 5

RCOA recommends that the Australian Government introduce legislation to:

- a) Abolish mandatory immigration detention in favour of a discretionary system under which detention is applied as a last resort and only when strictly necessary;
- b) Restrict immigration detention to a maximum of 30 days without judicial review and six months overall;
- c) Establish a system of judicial review of immigration detention longer than 30 days, with subsequent reviews carried out at regular intervals if continued detention is deemed appropriate;
- d) Codify clear criteria for lawful detention and minimum standards of treatment for people subject to immigration detention, in line with UNHCR's Detention Guidelines;³⁴ and
- e) Prohibit the detention of children in closed immigration detention facilities, with community-based support arrangements to be used in place of closed detention.

4.4. Children born in Australia to stateless parents

In addition to introducing new measures to resolve and prevent statelessness, the Government should seek to ensure that existing measures are fully implemented. In particular, RCOA recommends that the Government immediately cease the delays in granting citizenship to children born in Australia to stateless parents.

Recommendation 6

RCOA recommends that the Australian Government expeditiously grant citizenship to all children born in Australia who would otherwise be stateless, as required by the Australian Citizenship Act 2007.

4.5. Removing legislative barriers to resolving statelessness

RCOA also strongly recommends that the Australian Government reconsider recently-introduced and proposed legislative measures which may hamper efforts to resolve and prevent statelessness.

Recommendation 7

RCOA recommends that the Australian Government:

- a) Abolish Temporary Protection Visas and Safe Haven Enterprise Visas and instead grant permanent Protection Visas to all people who are found to be in need of Australia's protection or are found to be stateless.
- b) If recommendation 7(a) is not implemented, that a clear pathway to permanent residency be established for Temporary Protection Visa holders.

Recommendation 8

RCOA recommends that the Australian Parliament not pass the Australian Citizenship and Other Legislation Amendment Bill 2014 and the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

4.6. Removing barriers to citizenship

Finally, RCOA recommends that the Australian Government consider measures to address current barriers to Australian citizenship faced by refugee and humanitarian entrants (groups to which the majority of stateless people belong), to ensure that citizenship is accessible to stateless people.

³⁴ UNHCR (2012). *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention*. <http://www.unhcr.org/505b10ee9.html>

Recommendation 9

RCOA recommends that the Australian Government broaden the eligibility criteria for current fee concessions to and/or introduce fee waivers for people seeking to apply for Australian Citizenship who are otherwise eligible but unable to afford the full fee.

Recommendation 10

RCOA recommends that the Australian Government consider waiving the requirement to complete the Australian Citizenship Test for refugee and humanitarian entrants and stateless people.

APPENDIX: PROPOSAL FOR A STATELESSNESS STATUS DETERMINATION PROCEDURE

Prepared by Professor Jane McAdam³⁵

1. We recommend that statelessness status determination form part of a single asylum procedure. As the Summary Conclusions from UNHCR's Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons note: "The advantages of a fused procedure include avoiding the extra costs of establishing a separate administrative procedure to deal with statelessness given the relatively low number of statelessness cases compared to refugee cases and building on the relevant expertise and knowledge already developed by authorities involved in refugee status determination."³⁶
2. A single procedure would mean that decision makers would first assess applicants against the refugee criteria (s 36(2)(a)), then (if found not to be a refugee) against the complementary protection grounds (s 36(2)(aa)), and finally (if neither a refugee nor a beneficiary of complementary protection) against the statelessness provision (proposed s 36(2)(bb)). 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.³⁷
3. 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.
4. We recommend that, as in Hungary, UNHCR be granted special rights in the procedure.³⁸ Section 81 of the Hungarian *Aliens Act* stipulates 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 judgement by the alien policing authority.
5. Similarly, as in Hungary, we recommend that unaccompanied minors be granted an *ex officio* guardian throughout the determination process.
6. We recommend that the standard of proof require the applicant to 'substantiate' his or her statelessness. The term 'substantiate' reflects the practical difficulties of an applicant being able to *prove* statelessness, and the protection-oriented objective of the procedure.
7. On account of the challenges many individuals will 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.³⁹ This burden should be shared by the applicant and the decision making authority. That authority must identify which authorities in the

³⁵ This is an edited extract. For the complete paper, see RCOA (2011). *Australia's Statelessness Determination Procedure*.

<http://www.refugeecouncil.org.au/r/s&l/120600-SSD.pdf>

³⁶ UNHCR (2010). "Summary Conclusions." *Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons*. Geneva, Switzerland: 6-7 December 2011. <http://www.unhcr.org/4d919a436.html>. Referred to as the "Geneva Conclusions". While we endorse the arguments outlined there for creating a separate body to determine statelessness, including "awareness-raising about statelessness and developing specialization and expertise within the authority concerned as statelessness raises many issues that are distinct from those considered in refugee status determination" (para. 6), we believe that a single procedure will be more palatable in Australia from a financial and administrative perspective.

³⁷ If a person has no refugee or complementary protection claim, then these issues should be able to be dealt with relatively swiftly.

³⁸ Gyulai, G. (2010). *Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness*.

<http://www.refworld.org/docid/4d6d26972.html>, pp. 22-3; Aliens Government Decree, s 164(1).

³⁹ UNHCR 2010, Geneva Conclusions.

relevant third countries are competent to establish nationality, based on the law and practice of those countries.⁴⁰

8. It is suggested 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.⁴¹ Decision makers must consider not only the law with respect to nationality in a given State, but also the practice in that State.⁴²
9. Given that it is nonsensical for an applicant to have to demonstrate that none of the world's 200 States considers him or her to be a national, it is proposed that the Hungarian statelessness determination model is followed. This provides that the relevant countries for determining nationality are:
 - a) The country where the applicant was born;
 - b) The country of the applicant's former place of stay/residence;
 - c) The country of nationality of the applicant's parents.⁴³
10. Although voluntary renunciation of nationality does not preclude a person from being recognised as stateless,⁴⁴ the Government may be concerned by the prospect of an individual renouncing his or her nationality solely for the purpose of claiming protection in Australia. To address this, the legislation could stipulate that protection will not be forthcoming if the individual could recover his or her former nationality within a reasonable period of time.⁴⁵
11. If requested by the applicant, Australian authorities should make diplomatic representations abroad to establish facts on which the statelessness claim is brought.⁴⁶ Extreme care must be taken where the person also claims to be a refugee or beneficiary of complementary protection: "Under no circumstances should contact be made with authorities of a State against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is not a refugee or entitled to a complementary form of protection."⁴⁷ This includes the exhaustion of legal remedies.⁴⁸ This is why it is essential that the refugee and complementary protection claim is assessed *prior* to the statelessness claim.
12. Time limits should be set for responses by third States so that a person is not left in limbo for long periods of time. This is particularly important where people are held in immigration detention pending resolution of their case.⁴⁹ In some cases, the lack of a response may indicate that a person is not considered a national by that third State.⁵⁰
13. The following information should therefore be taken into account in determining whether a person is stateless:
 - a) the opinion of UNHCR;
 - b) the information provided by Australian diplomatic representations abroad;
 - c) the information provided by foreign State authorities; and
 - d) information submitted by the applicant.⁵¹

⁴⁰ UNHCR 2010, Prato Conclusions, para. 13

⁴¹ UNHCR 2010, Geneva Conclusions, para. 13

⁴² UNHCR 2010, Geneva Conclusions, para. 16

⁴³ See also UNHCR 2010, Geneva Conclusions, para. 14

⁴⁴ UNHCR 2010, Prato Conclusions, para. 20

⁴⁵ Gyulai 2010, p. 15

⁴⁶ This will only be required in cases where there is insufficient evidence otherwise available. See UNHCR 2010, Geneva Conclusions, para. 17

⁴⁷ UNHCR 2010, Geneva Conclusions, para. 17

⁴⁸ UNHCR 2010, Geneva Conclusions, para. 9

⁴⁹ UNHCR 2010, Geneva Conclusions, para. 23: "States should take particular care to avoid the arbitrary detention of applicants for statelessness status and consider alternatives to detention pending determination of statelessness status." See also The Equal Rights Trust 2010, from p. 208

⁵⁰ UNHCR 2010, Geneva Conclusions, para. 20

⁵¹ Aliens Government Decree, Section 164 (1), cited in Gyulai 2010, p. 26