



Australia should adopt a Human Rights Act to protect the rights of stateless people, including children

Submission to the Parliamentary Joint Committee on Human Rights – Inquiry into Australia's Human Rights Framework

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Contact

Professor Michelle Foster¹

Director: Peter McMullin Centre on Statelessness

T: (03) 8344 1149

E: michelle.foster@unimelb.edu.au

W: <https://law.unimelb.edu.au/centres/statelessness>

Katie Robertson²

Director: Stateless Legal Clinic / Co-chair: Stateless Children Australia Network

T: (03) 8344 2640

E: katie.robertson@unimelb.edu.au

W: <https://law.unimelb.edu.au/centres/statelessness/engage/stateless-children-legal-clinic>

W: <https://law.unimelb.edu.au/centres/statelessness/engage/stateless-children-legal-clinic/stateless-children-australia-network>

Peter McMullin Centre on Statelessness

The Peter McMullin Centre on Statelessness (**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.

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Stateless Legal Clinic

The Stateless Legal Clinic (**SLC**) is a unique service providing legal education and aid to eligible stateless children in their application for Australian citizenship. The SLC is a partnership between the Peter McMullin Centre on Statelessness, the Refugee Advice Casework Service and the Melbourne Law School Clinics at the University of Melbourne.

Stateless Children Australia Network

The Stateless Children Australia Network (**SCAN**) is an independent, not-for-profit network aimed at developing knowledge regarding stateless children in Australia and increasing pathways to legal assistance for stateless children entitled to Australian citizenship.

Follow us at https://twitter.com/SCAN_Au

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1. Executive Summary

1. The Peter McMullin Centre on Statelessness (**PMCS**), Stateless Legal Clinic (**SLC**) and Stateless Children Australia Network (**SCAN**) welcome the opportunity to make this submission to the Committee regarding the Inquiry into Australia's Human Rights Framework.
2. The PMCS is an expert centre at the University of Melbourne focused on reducing statelessness and protecting the rights of stateless people in Australia.

The SLC works directly with stateless children and adults in Australia.

SCAN works directly with lawyers and other service providers who assist stateless children throughout Australia. SCAN's advisory council consists of leading experts on statelessness in Australia, including members with lived experience of statelessness.

3. The Australian Parliament should enact a Human Rights Act for the following key reasons:
 - (i) Australia's current human rights framework **does not adequately protect stateless persons**, including children, or reduce statelessness.
 - (ii) **Stateless people in Australia, including children, lack legally enforceable rights to basic entitlements**, such as education.
 - (iii) **Stateless persons in Australia are at real risk of mandatory, prolonged and indefinite detention**, noting that the High Court of Australia has found it permissible to detain stateless persons indefinitely.³

³ *Al-Kateb v Godwin* (2004) 219 CLR 562; *M47/2018 v Minister for Home Affairs* [2019] HCA 17.

4. PMCS, SLC and SCAN **recommend** that:

- (i) The Australian Parliament **enact a Human Rights Act**;
- (ii) The Human Rights Act adopted include **a right to education**, as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia';⁴
- (iii) The Human Rights Act adopted include **a right to protection from torture and cruel, inhuman or degrading treatment** as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia';⁵
- (iv) The Human Rights Act adopted include **a right to liberty and security of person** as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia';⁶ and
- (v) The Human Rights Act adopted include **a right to humane treatment when deprived of liberty** as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia'.⁷

⁴ Australian Human Rights Commission, 'A Human Rights Act for Australia' (Position paper: Free and Equal, December 2022) 115 <<https://humanrights.gov.au/human-rights-act-for-australia>>.

⁵ Ibid 110.

⁶ Ibid 112.

⁷ Ibid.

2. What is 'Statelessness?'

5. A stateless person is someone who does not have a nationality of any country. This means they are not recognised as 'belonging' to any country.⁸ The international legal definition of a 'stateless person' is 'a person who is not considered as a national by any state under the operation of its law.'⁹
6. There are estimated to be between 10–15 million stateless people in the world, a third of which are children.¹⁰ The United Nations High Commissioner for Refugees (UNHCR) estimate that a child is born into statelessness at least every 10 minutes.¹¹ Stateless children can face barriers to a range of essential human rights by virtue of having no nationality, including access to education and health care.¹²

*'To be stateless means to have no country. This is very hard – and I feel deeply sad about it. I know people who aren't allowed to study or work because they are stateless – I worry about this for my daughter.'*¹³

- Aisha, stateless Rohingya mother of one.¹⁴

⁸ Peter McMullin Centre on Statelessness, 'An Overview of Statelessness' (Factsheet, University of Melbourne, February 2023) 1 <https://law.unimelb.edu.au/__data/assets/pdf_file/0009/4460454/Statelessness_overview_factsheet_Feb_2023.pdf>.

⁹ *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('1954 Convention'). See further Peter McMullin Centre on Statelessness, 'The 1954 Convention relating to the Status of Stateless Persons' (Factsheet, University of Melbourne, February 2023) <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/4460460/1954-Convention_factsheet_Feb_2023.pdf>.

¹⁰ 'Statelessness Around the World', *United Nations High Commissioner for Refugees (UNHCR)* (Web Page) <<https://www.unhcr.org/au/about-unhcr/who-we-protect/stateless-people/ending-statelessness/statelessness-around-world>>.

¹¹ United Nations High Commissioner for Refugees (UNHCR), 'I am Here, I Belong: The Urgent Need to End Childhood Statelessness' (Report, November 2015) 4 <https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf>; Institute on Statelessness and Inclusion (ISI), 'Childhood Statelessness' (Report, 2018) 4, 9 <<https://files.institutesi.org/childhood-statelessness.pdf>>.

¹² See further, Peter McMullin Centre on Statelessness, 'Childhood Statelessness' (Factsheet, University of Melbourne, 2020, updated February 2023) <https://law.unimelb.edu.au/__data/assets/pdf_file/0008/4460462/childhood-statelessness_factsheet_Feb-2023.pdf>.

¹³ Robertson and Dale (n 2).

¹⁴ Name changed to protect identity.

(i) What is 'Nationality' and 'Citizenship'?

7. The terms 'nationality' and 'citizenship' are often used interchangeably.¹⁵
8. 'Nationality' is a term used to describe an individual's link to the state (or 'country') in the context of international law.¹⁶ 'Citizenship' is the term that is usually used in a domestic context, for example in domestic law.¹⁷

'For us, being stateless means we don't have any country or documentation. We feel very distressed about this.'¹⁸

- Muhammad and Sumaiya, stateless Rohingya parents to three children.¹⁹

¹⁵ Peter McMullin Centre on Statelessness, 'An Overview of Statelessness' (n 8) 1.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Robertson and Dale (n 2).

¹⁹ Names changed to protect identities.

3. Statelessness in Australia

(i) The Numbers:

9. 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.²⁰
10. The recent UNHCR Global Trends Report identified 8,314 stateless persons in Australia for 2022 but noted that given Australia lacks a process for identifying stateless persons (i.e. a 'statelessness determination procedure' discussed at 14 below) this figure does not capture all stateless persons in Australia and cannot be considered a true estimate of statelessness in Australia.²¹ The true number of stateless persons in Australia is likely to be considerably higher.²²

(ii) Australia's International Human Rights 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.²³

²⁰ Michelle Foster, Jame McAdam and Davina Wadley, 'Part One: The Protection of Stateless Persons in Australian Law — The Rationale for a Statelessness Determination Procedure' (2017) 40 *Melbourne University Law Review* 401, 416.

²¹ Annex table 5 in UNHCR, footnote 3, United Nations High Commissioner (UNHCR) Global Trends – Forced Displacement in 2021 (Report, 19 June 2022) <<https://www.unhcr.org/global-trends>>.

²² PMCS is currently undertaking the first 'mapping' study of statelessness in Australia, with the aim of better identifying the numbers, location and protection needs of stateless persons in Australia.

²³ 1954 Convention (n 9); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('1961 Convention').

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).²⁴

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).²⁵

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).²⁶

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).²⁷

²⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). 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>>.

²⁵ *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>>.

²⁶ *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>>.

²⁷ *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>>.

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).²⁸

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.

(iii) Australia's Limited Domestic Framework for Protecting the Rights of Stateless Persons:

*'We are stateless – we have no country. This is very hard. In our home country we had nothing, our life was very difficult. We couldn't do anything, go anywhere, choose our path.'*²⁹

- Nur, stateless Rohingya mother of four.³⁰

14. Citizenship is not defined under the Australian Constitution,³¹ nor does Australia have a National Bill of Rights. Furthermore, Australia does not have a procedure within its legislative framework (i.e. a 'statelessness determination procedure') for determining who is a 'stateless person.'³²

15. 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,³³ or application.³⁴

²⁸ *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/MTDGS/Volume%20I/Chapter%20IV/IV-15.en.pdf>>.

²⁹ Robertson and Dale (n 2).

³⁰ Name changed to protect identity.

³¹ *Australian Constitution*.

³² Foster, McAdam and Wadley (n 20) 421.

³³ *Australian Citizenship Act 2007* (Cth) s 12(1).

³⁴ *Ibid* s 16.

16. 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.³⁵
17. 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.³⁶
18. The focus of the SLC is on assisting eligible children, born to parents who are stateless, to apply for Australian citizenship under this provision of the Citizenship Act.

(iv) Critical Gaps in Protections for Stateless People in Australia:

'Being stateless has been a huge source of sadness for me in my life. At times it has made me question my very existence and made me wonder why my parents chose to bring me into this world. I've never felt like I have a future. Wherever I've gone, I have no rights.

*I hope for better for my children.'*³⁷

- Amir, stateless Palestinian father of four.³⁸

19. The Australian legislative framework does not 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.
20. 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

³⁵ Ibid s 21(8).

³⁶ Michelle Foster, Jame McAdam and Davina Wadley, 'Part Two: The Prevention and Reduction of Statelessness in Australia — An Ongoing Challenge' (2017) 40 *Melbourne University Law Review* 456, 472–3, quoting Revised Explanatory Memorandum, Australian Citizenship Bill 2005 (Cth) 38.

³⁷ Robertson and Dale (n 2).

³⁸ Name changed to protect identity.

to citizenship) if they are eligible for a temporary or substantive visa or successfully obtain ministerial intervention..³⁹

21. Generally, people who are unsuccessful in obtaining a visa are expected to return to their country of origin..⁴⁰ However, stateless individuals are not nationals of their countries of origin and are therefore usually unable to return..⁴¹ This leaves stateless individuals who do not qualify for citizenship at risk of prolonged or indefinite periods of immigration detention.

³⁹ Refugee Council of Australia, 'Stateless in Australia' (Report, August 2015) 14–15
<<https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/1508-Statelessness.pdf>>.

⁴⁰ Ibid 14.

⁴¹ Ibid 14–15.

3. Why Australia Needs a Human Rights Act to Protect Stateless People

22. As outlined above, current Australian law does not adequately protect the rights of stateless people in this country.
23. A Human Rights Act is needed to adequately protect the rights of stateless people, including children, for the following key reasons –

(i) Stateless people in Australia, Including Children, Lack Legally Enforceable Rights to Basic Entitlements, Such as Education and Healthcare:

*'All my children feel Australian. But being on a temporary visa makes it hard. My wife and I try to shield them from this uncertain future as much as we can, but this isn't always easy. Just last week the Principal at my children's school approached my wife in the school yard to ask for a certain letter he needs regarding the enrolment, because our visa has expired. Our children overheard this conversation and were asking us that night 'what does this mean?' This was hard for my wife and I – how can we explain this? We want our children to feel secure, and not carry our worries about their future.'*⁴²

- Amir, stateless Palestinian father of four.⁴³

24. As noted, 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'.⁴⁴
25. In the absence of a stand-alone scheme to protect and uphold the rights of stateless people in Australia, stateless adults and children can face barriers in accessing and enforcing basic rights, such as access to education and healthcare. For an example of the very real human impact, this can have on

⁴² Robertson and Dale (n 2).

⁴³ Name changed to protect identity.

⁴⁴ Foster, McAdam and Wadley (n 36) 456, 459, 497.

the life of stateless children in Australia, see the case study discussed at 33 below.

(ii) Stateless People are at Real Risk Prolonged and Indefinite Detention in Australia:

26. As set out by UNHCR, ‘the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention’.⁴⁵ The risk of detention is heightened in the Australian context, due to the mandatory nature of immigration detention in this country. As stated, above, 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.⁴⁶
27. Other than the possibility of Ministerial intervention, stateless persons who do not meet the refugee criteria are likely exposed to ‘prolonged indefinite detention’.⁴⁷
28. 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*,⁴⁸ 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.

⁴⁵ United Nations High Commissioner for Refugees (UNHCR), ‘Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons’ (Handbook, 2014) 41 [115] <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>.

⁴⁶ Foster, McAdam and Wadley (n 36) 443.

⁴⁷ Ibid 442–3.

⁴⁸ *Al-Kateb v Godwin* (n 3).

29. 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.⁴⁹
30. 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.⁵⁰ Despite the evacuation of the final refugees from Nauru on 24 June 2023, the retained power to utilise offshore processing on Nauru remains a serious concern.⁵¹
31. To date, the UN Human Rights Committee has issued numerous decisions in which it has found Australia's policy of mandatory immigration detention in breach of Article 9 of the ICCPR.⁵² 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.⁵³ The Human Rights Committee

⁴⁹ *M47/2018 v Minister for Home Affairs* (n 3).

⁵⁰ 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/>>.

⁵¹ Doherty, Ben and Eden Gillespie, 'Last refugee on Nauru evacuated as Australian government says offshore processing policy remains', *The Guardian* (online, 25 June 2023) <<https://www.theguardian.com/australia-news/2023/jun/25/last-refugee-on-nauru-evacuated-as-australian-government-says-offshore-processing-policy-remains>>.

⁵² Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003); Human Rights Committee, *Views: Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); Human Rights Committee, *Shams et al. v. Australia*, 90th 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*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); Human Rights Committee, *Views: Communication No 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006); Human Rights Committee, *Views: Communication No 2229/2012*, 116th sess, UN Doc CCPR/C/116/D/2229/2012 (17 November 2016); and Human Rights Committee, *Views: Communication No 2233/2013*, 116th 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).

⁵³ *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*, 80th sess, UN Doc A/HRC/WGAD/2017/71 (21 December 2017) [53]–[55].

has stated that Australia is under obligation to take steps to prevent similar violations in future..⁵⁴

4. How a Human Rights Act would Protect Stateless People in Australia, including Children

*'The rules change all the time depending on the Government of the day. I see them remove people on visas. With citizenship, I would be less afraid for my children.'*⁵⁵

- Amir, stateless Palestinian father of four.⁵⁶

(i) Ensuring Stateless Children can Access Education:

32. This submission supports the proposal by the Australian Human Rights Commission that a **right to education** be incorporated into a federal Human Rights Act. This is especially important for stateless people. As the United Nations Committee on Economic, Social and Cultural Rights has explained:

'As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities'..⁵⁷

33. We support the right as framed by the Australian Human Rights Commission in its report as follows:

(1) Every child has the right to have access to free primary and secondary education without discrimination.

Note: This right should be interpreted in light of Article 24 of the CRPD

⁵⁴ Human Rights Committee, *Views: Communication No 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016) [12].

⁵⁵ Robertson and Dale (n 2).

⁵⁶ Name changed to protect identity.

⁵⁷ *d) General Comment No. 13: The right to education (article 13) (1999)*, Committee on Economic, Social and Cultural Rights Comm, UN Doc E/C.12/1999/10 (8 December 1999) ('*d) General Comment No. 13: The right to education (article 13) (1999)*').

(2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

(3) A child's parents or guardian may choose schooling for the child to ensure the religious and moral education of the child in conformity with their convictions, provided that the schooling conforms to the minimum educational standards required under law.⁵⁸

Case study: Sophie's Dreams of Becoming a Midwife

Hannah⁵⁹ is a stateless single mother to three children, living in Melbourne on a temporary protection visa. Her youngest three children were born in Australia and as such, have been able to secure Australian citizenship by virtue of the location of their birth, through assistance provided by the Stateless Legal Clinic. This means that when the children finish school, they will be able to access higher education through a commonwealth supported placement.

The eldest child, Sophie⁶⁰ was born in Myanmar and as such, remains stateless and is ineligible to apply for Australian citizenship. Currently in her final year of school, Sophie dreams of becoming a midwife. Her status as stateless, however, means that she is only able to apply for a position at a tertiary institute as an 'international student,' requiring her to pay a very high tutorial fee. Her mother is unable to afford this and as such, Sophie will be unable to study to become a midwife. Sophie is confused as to why her younger siblings will be afforded access to higher education opportunities that she is not.

34. An example of how enshrining the right to education in a federal Human Rights Act may assist somebody like Sophie can be found in the example of the Australian Capital Territory's (ACT) human rights legislation. The ACT's

⁵⁸ Australian Human Rights Commission (n 4) 115.

⁵⁹ Name changed to protect identity. The above case study is based on the real scenario faced by numerous stateless children and families that the Stateless Legal Clinic assists.

⁶⁰ Name changed to protect identity.

Human Rights Act (2004) protects the right to education under section 27A.⁶¹

Under this provision, the ACT's Human Rights and Discrimination Commissioner was able to effectively work with the ACT's Education and Training Directorate to reform its policy to ensure those seeking asylum while living in Canberra were not subjected to international student fees when applying for higher education, ultimately confirming that ACT public education is free for asylum seekers.⁶²

35. The authors of this submission submit that a similar reform could be reasonably applied and extended to stateless people in Australia, akin to the ACT example for asylum seekers, noting that stateless people on temporary protection visas are also considered 'international students' and prohibited from seeking high education due to high fees, in many jurisdictions throughout Australia, including Victoria.

(ii) Protecting the Rights of Stateless People Subject to Immigration Detention:

36. This submission supports the proposal by the Australian Human Rights Commission that the following rights be included in a Human Rights Act:

36.1. Protection from torture and cruel, inhuman or degrading treatment:

(1) A person must not be—

(a) subjected to torture; or

(b) treated or punished in a cruel, inhuman or degrading way;

or

⁶¹ *Human Rights Act 2004* (ACT) s 27A ('*Human Rights Act*').

⁶² ACT Human Rights Commission, 'Annual Report 2013–2014', (18 September 2014) 39 <https://hrc.act.gov.au/wp-content/uploads/2015/04/2014-09-15-Final-WCAG-2-0-Compliant_.pdf>. See also Human Rights Law Centre, 'Case 16: Access to Public School Education for Asylum Seekers', *Charter of Rights* (Case) <<https://charterofrights.org.au/101-cases/2022/10/26/case-16-access-to-public-school-education-for-asylum-seekers>>.

- (c) subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.⁶³

36.2. Right to liberty and security of person:

- (1) Every person has the right to liberty and security of person.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.
- (5) A person who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) Anyone who is awaiting trial must not be detained in custody as a general rule, but their release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.
- (7) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide the lawfulness of

⁶³ Australian Human Rights Commission (n 4) 110.

the detention and the court must make a decision without delay;
and order the person's release if the detention is unlawful.

- (8) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.
- (9) A person must not be imprisoned only because of the inability to carry out a contractual obligation.⁶⁴

36.3. Humane treatment when deprived of liberty:

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from convicted persons except in exceptional circumstances.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.⁶⁵

37. As noted above, stateless people face a disproportionate risk of indefinite or lengthy detention. The most recent publicly available statistics indicate that as at 30 April 2023, there were 38 stateless people in immigration detention.⁶⁶

38. In the absence of a statelessness determination procedure, the real figure may be higher. The average length of detention for stateless persons in Australia is 1,104 days.⁶⁷ Within this cohort, eight stateless people have been

⁶⁴ Ibid 112.

⁶⁵ Ibid.

⁶⁶ Australian Government Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (Report, April 2023) 9 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>>.

⁶⁷ As at 31 December 2022, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Answer to Question on Notice No SE23-538* (Supplementary Estimates, February 2023).

held in immigration detention for upwards of 4 years; two for upwards of six years, and one man has spent more than seven years in immigration detention.⁶⁸

39. The UN Human Rights Committee has previously found the detention of people in Australia's immigration detention centres to be arbitrary and amount to cruel, inhuman or degrading treatment under the *International Covenant on Civil and Political Rights* (ICCPR).⁶⁹ Despite being a party to the ICCPR, findings such as these have done little to change the nature and length of immigration detention in Australia, demonstrating the need for federal human rights legislation that is legally binding. At a very minimum, a Federal Human Rights Act that includes the rights stated above at 36 would require human rights to be considered by decision makers and government officials at all stages of the immigration detention process.

40. Indeed, as noted by Justice McHugh in his judgement in *Al-Kateb* (discussed at 28 above), the High Court was restrained (in the majority's opinion) from considering human rights in relation to the legality of indefinite detention in this country:

'It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights... It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine

<<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=dc204d21-6352-4d9d-8c58-729e9d45ae82>>.

⁶⁸ As at 31 December 2022, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Answer to Question on Notice No SE23-461* (Supplementary Estimates, February 2023) <<https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId20-PortfolioId20-QuestionNumber461>>.

⁶⁹ UN Human Rights Committee, *Casenote: F.K.A.G. et al. v Australia (UN Doc CCPR/C/108/D/2094/2011) and M.M.M. et al. v Australia*, UN Doc UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) ('*Casenote: F.K.A.G. et al. v Australia (UN Doc CCPR/C/108/D/2094/2011) and M.M.M. et al. v Australia*'). [https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/casenote-fkag-v-australia-and-mmm-v-australia#:~:text=Summary,and%20Political%20Rights%20\(ICCPR\)](https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/casenote-fkag-v-australia-and-mmm-v-australia#:~:text=Summary,and%20Political%20Rights%20(ICCPR))

whether the law of the Parliament is within the powers conferred on it by the Constitution.'

41. The adoption of a Human Rights Act would mean that human rights provisions could be admissible and relevant in future judgements in which courts are otherwise constrained to consider the 'law of the Parliament'.

5. Recommendations

42. PMCS, SLC and SCAN recommend that:

- (i) The Australian Parliament **enact a Human Rights Act**;
- (ii) The Human Rights Act adopted include **a right to education**, as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia';⁷⁰
- (iii) The Human Rights Act adopted include **a right to protection from torture and cruel, inhuman or degrading treatment** as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia';⁷¹
- (iv) The Human Rights Act adopted include **a right to liberty and security of person** as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia';⁷² and
- (v) The Human Rights Act adopted include **a right to Humane treatment when deprived of liberty** as proposed by the Australian Human Rights Commission in their Position Paper 'A National Human Rights Act for Australia'.⁷³

⁷⁰ Australian Human Rights Commission (n 4) 115.

⁷¹ Ibid 110.

⁷² Ibid 112.

⁷³ Ibid.