

1961 CONVENTION ANNIVERSARY SYMPOSIUM

PRACTICAL MEASURES TO MEANINGFULLY IMPLEMENT ARTICLE 1(1) OF THE 1961 *CONVENTION* *ON THE REDUCTION OF STATELESSNESS* IN AUSTRALIAN LAW AND PRACTICE

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I INTRODUCTION

Being stateless has been a huge source of sadness for me in my life. I hope for better for my children.¹

— Amir,* Australian-based stateless Palestinian father of four.

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¹ Katie Robertson and Sarah Dale, *A Place to Call Home: Shining a Light on Unmet Legal Need for Stateless Refugee Children in Australia* (Report, Refugee Advice & Casework Service and Peter McMullin Centre on Statelessness, March 2021) 9 <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3645547/StatelessChildrenReport.pdf> (*‘A Place to Call Home’*).

2021 marked the 60th anniversary of the 1961 *Convention on the Reduction of Statelessness* ('1961 Convention').² The 1961 Convention is a cornerstone international treaty in the campaign to end statelessness for the millions of stateless persons — including children — worldwide.³ Australia was one of the first nations to ratify this treaty, which requires that states establish safeguards aimed at reducing statelessness.⁴ In theory, Australia has shown a firm commitment to implementing such safeguards by enshrining the right of Australian-born stateless children to apply for citizenship in domestic law. In practice, however, little action has been taken to meaningfully address this critical human rights issue. An innovative new legal clinic, launched on the 60th anniversary of the 1961 Convention, aims to address this issue by providing free legal assistance to stateless children in their application for Australian citizenship.

This commentary will begin by examining Australia's obligations to Australian-born stateless children under international and domestic law. It will then outline three key barriers to the practical implementation of these obligations, which operate as obstacles in the path towards meaningfully reducing statelessness. The commentary will conclude by outlining three key practical measures that aim to assist children break the inter-generational cycle of statelessness imposed on them by birth.

II CHILDHOOD STATELESSNESS AT A GLANCE

There is a huge difference in this world for children with citizenship, and those without it.⁵

Aisha,* Australian-based stateless Rohingya mother of one.

The 1954 *Convention relating to the Status of Stateless Persons* ('1954 Convention') defines a 'stateless person' as a person who is not considered as a national by any state under the operation of its law.⁶ In effect, this means that stateless persons, including children, are not recognised as 'belonging' to any country.⁷

A third of the world's stateless population are believed to be children, with the United Nations High Commissioner for Refugees ('UNHCR') estimating that a

² *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('1961 Convention').

³ The most recently available United Nations High Commissioner for Refugees ('UNHCR') data records 4.2 million stateless people as at 2020; however, the agency notes the true number is believed to be much higher: UNHCR, *Global Trends: Forced Displacement in 2020* (Report, 2021) 50 <<https://www.unhcr.org/en-au/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>> ('*Global Trends 2020*').

⁴ Australia acceded to the 1961 Convention (n 2) on 13 December 1973. See '4. Convention on the Reduction of Statelessness', *United Nations Treaty Collection* (Web Page, 4 November 2021) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5> ('UNTC 1961 Convention Page').

⁵ *A Place to Call Home* (n 1) 3.

⁶ *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1 ('1954 Convention').

⁷ Peter McMullin Centre on Statelessness, *An Overview of Statelessness* (Factsheet, 2021) 1.

child is born into statelessness at least every 10 minutes.⁸ The daily lived reality for stateless children can be extremely challenging. By virtue of having no nationality, such children can face barriers to a range of essential human rights such as education and health care.⁹

III CHILDHOOD STATELESSNESS: THE AUSTRALIAN CONTEXT

I want my children to have a better life — I want them to be Australian citizens. This is my dream.¹⁰

— Nur,* Australian-based stateless Rohingya mother of four.

In theory, Australia has shown a strong commitment to reducing child statelessness by ratifying both the *1954 Convention* and the *1961 Convention* without reservation.¹¹ Australia is also party to several international agreements that protect the rights of stateless children and ensure the right to nationality.¹²

Furthermore, Australia was one of the first states to ratify the *1961 Convention* and subsequently implemented one of its key articles into Australian domestic law.¹³ Article 1(1) of the *1961 Convention* provides that a contracting state shall grant nationality to a person born in its territory who would otherwise be stateless — including at birth, by operation of law.¹⁴

Section 21(8) of the *Australian Citizenship Act 2007* (*'Citizenship Act'*) aims to directly implement art 1(1) by providing that a person born in Australia who is not (nor has ever been) a citizen or national of a foreign country and is not entitled to acquire the citizenship or nationality of another state is eligible for Australian citizenship.¹⁵

Although Australia has shown leadership in aiming to reduce childhood statelessness in theory, the research discussed herein indicates that more needs to be done to practically implement Australia's obligations and ensure stateless children are meaningfully able to access their entitlements under law.

⁸ 'Statelessness around the World', *United Nations High Commissioner for Refugees* (Web Page) <<https://www.unhcr.org/en-au/statelessness-around-the-world.html>>; UNHCR, *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness* (Report, 2015) 4 <https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf>.

⁹ *ibid* 16–17.

¹⁰ *A Place to Call Home* (n 1) 5.

¹¹ Australia acceded to the *1954 Convention* (n 6) on the same date as its accession to the *1961 Convention* (n 2): 13 December 1973. See *UNTC 1961 Convention Page* (n 4); '3. Convention relating to the Status of Stateless Persons', *United Nations Treaty Collection* (Web Page, 4 November 2021) <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en>.

¹² For a comprehensive list, see *A Place to Call Home* (n 1) 12.

¹³ See generally, *UNTC 1961 Convention Page* (n 4).

¹⁴ *1961 Convention* (n 2) art 1(1).

¹⁵ *Citizenship Act 2007* s 21(8) (Australia).

IV ACCESSING CITIZENSHIP IN AUSTRALIA: THE REALITY

Citizenship to me means protection and certainty for my children. Without it, I fear they have no future.¹⁶

— Amir,* Australian-based stateless Palestinian father of four.

As legal practitioners, my colleague Sarah Dale¹⁷ and I have spent several years assisting stateless Australian-born refugee children navigate the application process for citizenship.

We have identified three key issues preventing stateless Australian-born children from meaningfully accessing the protections afforded to them by international and domestic law.¹⁸

A *Issue One: Lack of Awareness*

Our lawyer ... first told us about applying for citizenship for our two youngest children — we didn't know this was possible. Sometimes I wonder — if they hadn't told me about this process, how would I know?¹⁹

— Amir,* Australian-based stateless Palestinian father of four.

Our research flows from our observed experience that parents of stateless children are unlikely to know that their child has a potential claim to Australian citizenship.²⁰ Stateless parents are usually informed of this entitlement when (or if) their lawyer proactively flags it with them, often inadvertently in the course of receiving advice about their refugee status.

None of the families interviewed in our research had been notified of their child's entitlement to apply for citizenship by the Australian Government.

Poor awareness of the entitlement to apply for citizenship within the stateless community is complicated by a general lack of knowledge and expertise pertaining to statelessness in the Australian legal profession.²¹ Furthermore, there is a lack of targeted legal outreach within stateless communities regarding this entitlement and, more fundamentally, a lack of legal services to assist stateless children with these claims.²²

¹⁶ *A Place to Call Home* (n 1) 2.

¹⁷ Sarah Dale is the Principal Solicitor and Centre Manager of the Refugee Advice & Casework Service and co-author of the report *A Place to Call Home* (n 1). She also leads the Centre's Stateless Children Program which provides assistance to stateless Australian-born children in applying for citizenship.

¹⁸ Our research focused on stateless, Australian-born children within Australia's refugee and asylum seeker cohort. Specifically, those born to parents who arrived in Australia seeking asylum by boat after 19 July 2013 and for whom pathways to permanent protection are extremely limited. See *A Place to Call Home* (n 1) 3.

¹⁹ *ibid* 5.

²⁰ *ibid* 14.

²¹ *ibid* 15.

²² *ibid* 15.

B *Issue Two: Difficulty in Accessing and Navigating the Citizenship*

Application Process

We would never have known about, or been able to navigate the citizenship process without a lawyer. Accessing free legal advice has been essential for us.²³

— Muhammad and Sumaiya,* Australian-based stateless Rohingya parents to three children.

In addition to the lack of awareness of their child’s entitlement to apply for Australian citizenship, our research indicated that parents of stateless children experience difficulties navigating the complex and administratively burdensome application process without access to free, specialised legal support.²⁴

This is complicated by a lack of targeted legal funding for stateless children in Australia. Our research indicates that stateless children with access to quality legal assistance have better progressed citizenship claims than those who do not.²⁵ Furthermore, significant barriers exist for non-English speaking applicants. Information regarding the application process, available on the Department of Home Affairs website only appears in English.²⁶ The relevant application form is also only available in English and is arduous and lengthy; 27 pages in length including 51 questions, a majority of which are not relevant to Australian-born stateless children.²⁷ Indeed, even where stateless children have a relatively straightforward claim to citizenship, they face an average wait time of 872 days for their application to be processed.²⁸

C *Issue Three: A Lack of Consistent and Coordinated Data Regarding*

Australia’s Stateless Population

The final key issue identified in our research is more fundamental; the number of stateless persons in Australia — including children eligible to apply for citizenship — is unknown. This is due to a lack of a coordinated or consistent approach to recording such persons.²⁹

Publicly available data regarding Australia’s stateless population does not correlate with statistics reported by the Australian Government to UNHCR. For example, data published by UNHCR for the 2019 reporting period lists a ‘-’ for Australia’s stateless population meaning that either ‘zero’ persons were reported

²³ *ibid* 14.

²⁴ *ibid* 14.

²⁵ *ibid* 15.

²⁶ See ‘Become an Australian Citizen (by Conferral): Born in Australia and Are Stateless’, *Department of Home Affairs* (Web Page, 17 March 2020) <<https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/born-in-australia-stateless>>.

²⁷ *ibid*. See also Department of Home Affairs, *Form 1290: Application for Australian Citizenship* (Form, August 2021).

²⁸ Information obtained by the author in a response to a *Freedom of Information Act 1982* (Australia) application, received 1 July 2020 (copy on hand with author).

²⁹ Michelle Foster, Jane McAdam and Davina Wadley, ‘Part One: The Protection of Stateless Persons in Australian Law: The Rationale for the Statelessness Determination Procedure’ (2016) 40(1) *Melbourne University Law Review* 401, 416.

or the data was unavailable.³⁰ Yet statistics published on the Department of Home Affairs website state that there were at least 3,214 stateless persons in Australia as of 31 December 2019.³¹ The true figure is likely to be much higher.³²

One likely explanation for the discrepancy between these two sets of data is that UNHCR's statistical reporting methodology 'reports on one legal status for each person of concern only'.³³ This means that only persons exclusively under UNHCR's statelessness protection mandate are reported in its statelessness statistics, whereas stateless persons, who also fall under other UNHCR protection mandates, such as refugees or asylum seekers, are excluded.³⁴

More recently, UNHCR's Global Trends Report for 2020 recorded 5,221 stateless persons in Australia; the most comprehensive figure to date.³⁵ UNHCR states that these figures have been sourced from the Australian Government, but cautions that, given Australia's lack of a statelessness determination procedure, the number does not capture all stateless persons and is therefore not an estimate of statelessness in Australia.³⁶ With no formal mechanism for identifying stateless persons in Australia, difficulties therefore exist in identifying and assisting children with an entitlement to citizenship.

V ACCESSING CITIZENSHIP IN AUSTRALIA: PRACTICAL SOLUTIONS

When our son was granted Australian citizenship we were extremely happy. It was a big deal, because we have never known in our lives what it is like to be a citizen.³⁷

— Muhammad and Sumaiya,* Australian-based stateless Rohingya parents to three children.

³⁰ UNHCR, *Global Trends: Forced Displacement in 2019* (Report, 2020) 82 n 8 <<https://www.unhcr.org/5ee200e37.pdf>> ('*Global Trends 2019*').

³¹ This figure includes 106 stateless persons in community detention, 1,060 stateless persons on Bridging Visas and 2,048 stateless persons on temporary visas. See Department of Home Affairs and Australian Border Force, *Immigration Detention and Community Statistics Summary* (Report, 31 December 2019) 8 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2019.pdf>>; Department of Home Affairs and Australian Border Force, *Illegal Maritime Arrivals on Bridging E Visa* (Report, 31 December 2019) <<https://www.homeaffairs.gov.au/research-and-stats/files/illegal-maritime-arrivals-bve-dec-2019.pdf>>; Department of Home Affairs, *IMA Legacy Caseload, Report on Processing Status and Outcomes* (Report, December 2019) 3 <<https://www.homeaffairs.gov.au/research-and-stats/files/ima-legacy-caseload-dec-2019.pdf>> ('*IMA Legacy Caseload Report 2019*').

³² These figures do not include stateless persons who arrived in Australia through the annual Special Humanitarian Program or the national Migration Program; nor do they include Permanent Residents or Permanent Protection Visas holders. As such, the true figure could be much higher. Furthermore, this figure does not include the 845 stateless people with a temporary visa application on hand or at review stage to prevent any double-counting. See *IMA Legacy Caseload Report 2019* (n 31).

³³ *Global Trends 2019* (n 30) 82 n 8. The only exception to this is Myanmar: 'due to the extraordinary size of the displaced stateless population from Myanmar, UNHCR considers it important to reflect the dual status that this population group possesses, pending a review of UNHCR reporting on statelessness': at 86.

³⁴ Institute on Statelessness and Inclusion, *The World's Stateless* (Report, December 2014) 7 <<https://files.institutesi.org/worldsstateless.pdf>>.

³⁵ *Global Trends 2020* (n 3) 71, citing UNHCR, *Global Trends Annex Tables* (Report, 2021) table 1 <<https://www.unhcr.org/en-au/60b638e37.pdf>> ('*Global Trends 2020 Annex Tables*').

³⁶ Regarding Australia, see *Global Trends 2020 Annex Tables* (n 35) n 2.

³⁷ See *A Place to Call Home* (n 1) 11.

The three issues regarding Australia's implementation of art 1(1) of the 1961 *Convention* outlined demonstrates that, although Australia may have shown initial leadership in committing to reduce statelessness, more needs to be done to meaningfully address the issue in practice. The next Part of this commentary will provide an overview of key measures that have been implemented to address these issues, drawing on the previous discussions.

A *Issue One: A New National Statelessness Network to Increase Awareness*

There is a significant lack of awareness within Australian stateless communities regarding the right of Australian-born children to apply for citizenship. This is further complicated by a general lack of expertise within the Australian legal community regarding statelessness.

To address this issue, the Stateless Children Australia Network ('SCAN') was established in 2021 with the aim of developing knowledge regarding the number, legal status and legal needs of Australian-born stateless children.³⁸ SCAN's mandate includes establishing a formal network of Australian legal practitioners currently assisting stateless children. The network aims to foster professional skill development regarding statelessness with the Australian legal community, increase legal assistance pathways for eligible children and support legal outreach to raise awareness within stateless communities regarding this key entitlement.

B *Issue Two: A New Legal Clinic to Assist Stateless Children*

There is a critical lack of legal services and legal funding for stateless children in Australia. While some legal services may assist stateless children with citizenship applications on an ad hoc basis, the Refugee Advice & Casework Service's ('RACS') Stateless Children Program hosts the only dedicated legal service for these children in Australia.³⁹

To address this need, in 2021, the Peter McMullin Centre on Statelessness and the Melbourne Law School ('MLS') Clinics at the University of Melbourne partnered with RACS to conduct a pilot legal clinic for stateless children. The Stateless Children Legal Clinic ('SCLC') had the dual benefit of increasing free legal assistance to stateless children and their families, as well as offering MLS Juris Doctor ('JD') students the opportunity to develop practical legal skills within a clinical legal education framework.⁴⁰ The initial pilot included two JD students who were supervised by the SCLC Coordinator and a dedicated solicitor from RACS.⁴¹

The pilot SCLC was highly successful. Between March and May 2021, the clinic assisted more than 20 stateless children to apply for Australian citizenship, with more waitlisted for future assistance.

³⁸ See 'Stateless Children Australia Network', *Peter McMullin Centre on Statelessness* (Web Page, 2021) <<https://law.unimelb.edu.au/centres/statelessness/engage/stateless-children-legal-clinic/stateless-children-legal-australia-network>>.

³⁹ See 'Stateless Children', *Refugee Advice & Casework Service* (Web Page) <<https://www.racs.org.au/stateless-children-program>>.

⁴⁰ See 'Stateless Children Legal Clinic', *Peter McMullin Centre on Statelessness* (Web Page, 2021) <<https://law.unimelb.edu.au/centres/statelessness/engage/stateless-children-legal-clinic>> ('SCLC Web Page').

⁴¹ The author gratefully acknowledges Refugee Advice & Casework Service solicitor Ahmad Sawan and Centre Director and Principal Solicitor Sarah Dale for their expert supervision of the pilot Stateless Children Legal Clinic.

The student learning experience was also positive, with one JD student stating the Stateless Children Legal Centre has been an experience unparalleled with anything else in my three years at law school. The opportunity to engage first-hand with clients has equipped me with a wealth of practical legal skills, and provided me with humbling insights into the challenges faced by stateless persons in Australia.⁴²

Media coverage of the SCLC also provided a platform to increase awareness of the issue of child statelessness in Australia within the broader community.⁴³

With support of the Hiam Choulay Trust, the SCLC was formally launched in September 2021.⁴⁴ Over the next five years, it is hoped the clinic will be able to assist many more stateless children to apply for Australian citizenship and, eventually, expand to include legal services for stateless adults.

C *Issue Three: The First 'Mapping' Study of Australia's Stateless Population*

Finally, a comprehensive understanding of the number and location of stateless persons, including children, is lacking in Australia. The SCLC and SCAN will begin to identify the number of stateless children in Australia on a small scale, through outreach and networking within the Australian legal community.

On a broader scale, the Peter McMullin Centre on Statelessness has recently embarked on the first comprehensive mapping study of statelessness in Australia, with the aim of developing a legal and policy framework for identifying and protecting stateless persons nationally.

VI THE NEED FOR PRACTICAL MEASURES TO MEANINGFULLY REDUCE CHILD STATELESSNESS

The three practical measures outlined previously aim to give meaningful implementation to Australia's obligations under art 1(1) of the *1961 Convention* in cases where stateless children have a prima facie entitlement to citizenship. The commentary, however, does not overlook other problematic aspects of Australia's implementation of art 1(1) in domestic law, particularly the focus afforded by s 21(8) of the *Citizenship Act* on a child's 'entitlement to, rather than actual grant of, foreign citizenship'.⁴⁵

Imperfections aside, there is a pathway for stateless children to apply for citizenship in Australia that is currently underutilised. Practical measures outlined previously aim to address this issue as a matter of priority.

⁴² 'SCLC Web Page' (n 40).

⁴³ See, eg, Max Chalmers, 'Legal Clinic to Count Australia's Stateless People as it Helps Give Children a Place to Call Home', *ABC News* (online, 25 March 2021) <<https://www.abc.net.au/news/2021-03-25/stateless-in-australia-citizenship-uncertain-future/100025166>>.

⁴⁴ The Hiam Choulay Trust is generously funded by the Cameron Foundation and is named in honour of her son, Fadi, who resides in Australia. Fadi was the first person to be granted an Australian skilled migrant visa through the 'Talent Beyond Boundaries' program. For more about Hiam and her son Fadi, see 'When No Country in the World Recognises You as a Citizen, Life Is an Obstacle', *ABC News* (online, 4 October 2019) <<https://www.abc.net.au/news/2019-10-04/what-it-is-like-to-be-stateless/11566518>>.

⁴⁵ Kim Rubenstein and Jacqueline Field, 'Conceptualising Australian Citizenship for Children: A Human Rights Perspective' (2013) 20(1) *Australian International Law Journal* 77, 89 (emphasis added).

VII CONCLUSION

As demonstrated in the case of Australia, it is not enough for states to commit to reducing statelessness on the global stage if they fail to implement a plan to meaningfully address the issue domestically. Although Australia is to be commended for ratifying the *1961 Convention* and implementing art1(1) into domestic law, there is little point in having good legal protections for stateless children if the very people they are intended to protect do not know about them.

The 60th anniversary of the *1961 Convention* provides a poignant time to reflect on Australia's commitment to reducing child statelessness to date. Implementing the ability for Australian-born stateless children to apply for citizenship into domestic law marks a commendable start. As this commentary has demonstrated, however, much more must be done to ensure stateless children and their families are aware of this legal entitlement and are able to access critical legal support when navigating the application process.

The launch of a new legal clinic to assist stateless children to apply for citizenship offers an innovative model for meaningfully implementing Australia's obligations under art 1(1). In conjunction with a new national network to support Australian lawyers working with stateless children, and Australia's first mapping of the nation's stateless population, it is hoped that the next 60 years of the *1961 Convention* will see a meaningful reduction in child statelessness.