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Minister for Immigration, Citizenship and Multicultural Affairs

By email to Alice Smith, senior advisor
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Dear Minister

Resolution of Status for Stateless Persons

The International Commission of Jurists (ICJ), founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights. The Australian Section of the ICJ (ICJ(AS)) has long been engaged with immigration law and has advocated for the rights of refugees and migrants. The ICJ(AS) regularly attends the Home Affairs-NGO Dialogue.

The plight of stateless persons in Australia has been brought to the attention of the ICJ(AS) by Alison Battison of Human Rights for All and leading legal academics including Prof Jane McAdam at the Kaldor Centre for International Refugee Law, University of New South Wales and Katie Robertson at the Peter McMullin Centre on Statelessness, University of Melbourne.

We applaud the Federal Government’s recent announcement of a new pathway to permanency for around 19,000 refugees on temporary protection visas. However, another 5,000 are still fighting for recognition of their asylum claims, while around 2,500 people have been “found not to engage protection obligations” and are expected to leave Australia “voluntarily”. Among this cohort are a number of stateless persons who have no country to which to return.

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The Universal Declaration of Human Rights (art 15) provides that everyone is entitled to a nationality. There are two Conventions on statelessness: the 1954 Convention relating to the Status of Stateless Persons, which sets out the obligations towards and the rights of stateless people; and the 1961 Convention on the Reduction of Statelessness, which deals with nationality based on birth (art 1), or on the nationality of a parent (art 4). Australia became a party to both Conventions in 1973.

The invisibility of stateless populations makes it impossible to quantify the global numbers of stateless persons, however UNHCR estimates there are millions. In 2015, the largest number of documented stateless persons were in the Asia Pacific region.¹ Intractable conflicts across the globe from Ukraine, Lebanon to Myanmar and Malaysia mean that stateless populations are growing. It is reasonable to anticipate that stateless persons living without a future in the Asia Pacific region may hope to come to Australia to seek protection and security. According to the UNHCR's most recent estimates, there were more than 7,600 stateless people in Australia in 2021.²

Australian migration law permits stateless people to be indefinitely detained. This situation was ruled lawful by the High Court of Australia in *Al-Kateb v Godwin* [2004] HCA 37.³

The UN Human Rights Covenants and Conventions, to which Australia is a party, protect the right to be free from arbitrary detention and the right to take proceedings to determine the lawfulness of detention.⁴ The UN Working Group on Arbitrary Detention and/or the UN Human Rights Committee have determined that indefinite detention arising from the operation of Australia's immigration legislation is a violation of Australia's human rights obligations in a number of respects. Australia has apparently ignored the findings of those bodies.

At the end of 2022, the Department of Home Affairs reported that 35 of the 1,089 people in mandatory immigration detention were, or claimed to be, stateless, while 58 stateless people, including 18 children, were living in community detention – 10.8% of the 538 in that unfortunate situation.⁵ As at 31 August 2022 more than thirty stateless persons had been held in immigration detention for more than two years.⁶

These statistics incorporate some vulnerable persons including stateless Rohingya, Palestinian, and Failli Kurdish refugees from Iran or Iraq, languishing in indefinite immigration detention, as well as notably:

¹ Refugee Council of Australia, *Statelessness in Australia*, August 2015, page 5, <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/1508-Statelessness.pdf>

² <https://www.unhcr.org/refugee-statistics/download/?url=bK4a0w>

³ <https://eresources.hcourt.gov.au/downloadPdf/2004/HCA/37>

⁴ International Covenant on Civil and Political Rights (art 9).

⁵ <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2022.pdf>

⁶ Legal and Constitutional Affairs Committee, Home Affairs Portfolio, Answer to Question on Notice no 188, Portfolio question no OBE22-188.

- Stateless man, Said Imasi (aged around 30), an orphan who believes he was born in the Western Sahara and has been detained in Villawood Immigration Detention Centre ever since arriving in Australia in 2010;⁷ and
- Stateless Torres Strait Islander Gus Kuster (aged 44), in detention since July 2018, who was born in Papua New Guinea but has lived in Australia since the age of four, identifies as Torres Strait Islander and Aboriginal and has been recognised as such by an Aboriginal Elder, and is not accepted as a citizen by PNG. An article on Gus was published in *The Guardian* on 19 February 2023.⁸

Australia still does not have a statutory process in place to resolve the status of stateless people – unlike 28 other countries.⁹ In the United Kingdom, for example, one can apply to stay for five years as a stateless person if not recognised as a citizen of, and cannot live permanently in, any country.¹⁰ Hungary, too, allows third-country nationals living there, who are presumed not to have citizenship of any state, to apply for stateless status.¹¹

In contrast, Australia leaves stateless people in legal limbo – in contravention of our protection obligations under international law.

The creation of a statelessness status determination procedure (SDP) in Australia is long overdue. Despite the Government expressing the intention to establish such a mechanism within the framework of the *Migration Act 1958* (Cth) as far back as 2011, this has never been done, with the assessment of statelessness claims still confined to an internal administrative process. Clearly, Australia needs a dedicated visa pathway for stateless people.

A way forward would be to adopt a dedicated legislative mechanism by which stateless people would be identified and given legal status under an enhanced single asylum procedure within the *Migration Act*. According to this proposal, long championed by several renowned Australian legal academics,¹² “decision makers would first assess applicants against the refugee criteria (s 36(2)(a)), then (if found not to be a refugee)

⁷ See, for example, <https://www.theguardian.com/australia-news/2018/jan/15/every-day-i-am-crushed-the-stateless-man-held-without-trial-by-australia-for-eight-years>

⁸ <https://www.theguardian.com/australia-news/2023/feb/19/all-i-know-is-australia-indigenous-man-left-in-immigration-detention-for-more-than-three-years>

⁹ States with a domestic procedures for determining statelessness status include Argentina, Brazil, Bulgaria, Costa Rica, Ecuador, France, Georgia, Hungary, Italy, Kosovo, Latvia, Mexico, Moldova, Montenegro, Panama, Paraguay, the Philippines, Spain, Turkey, the United Kingdom and Uruguay. See UNHCR, *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, July 2020, 1-66, <https://www.refworld.org/docid/5f203d0e4.html>

¹⁰ <https://www.gov.uk/stay-in-uk-stateless>

¹¹ http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=466&Itemid=1235&lang=en

¹² These legal academics include notably Michelle Foster, current Professor and Director of the Peter McMullin Centre on Statelessness at Melbourne Law School, and Professor Jane McAdam, Director of the Kaldor Centre for International Refugee Law at UNSW.

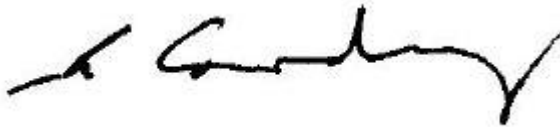
against the complementary protection grounds (s 36(2)(aa)), and finally (if neither a refugee nor a beneficiary of complementary protection) against the statelessness provision (proposed s 36(2)(bb)).”¹³

The ICJ(AS) supports the proposal for a stateless status determination process as proposed by Professor Jane McAdam.¹⁴ The suggested statelessness determination process would be positioned appropriately within the protection visa criteria in s36 *Migration Act* (1958) with assessment against specific protection criteria and a staged assessment process.

In this way, Australia would fulfil our international obligations to stateless people, alleviating the vulnerability, insecurity, and marginalisation which they are still forced to endure by providing them with permanent protection and a direct pathway to naturalisation.

Representatives of the ICJ(AS) would be pleased to discuss these matters with you or members of your staff.

Yours faithfully



Nicholas Cowdery AO KC
President

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¹³ Jane McAdam, “Appendix: Proposal for a Statelessness Status Determination Procedure”, para 2, in Refugee Council of Australia, *Statelessness in Australia*, August 2015, 3-26, <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/1508-Statelessness.pdf>. See also Michelle Foster, Jane 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* 401-55, https://law.unimelb.edu.au/_data/assets/pdf_file/0008/2369582/01-Foster,-McAdam-and-Wadley-Part-One-402-Post-Press.pdf; *Joint Submission to the Human Rights Council’s Universal Periodic Review: Australia*, 37th session, January/February 2021, https://law.unimelb.edu.au/_data/assets/pdf_file/0006/3436278/ISI-UPR-Submission-Australia-For-Website.pdf; *Factsheet: Statelessness in Australia*, Peter McMullin Centre on Statelessness, Melbourne Law School, https://law.unimelb.edu.au/_data/assets/pdf_file/0008/4488281/Statelessness-in-Australia.pdf.

¹⁴ See footnote 13 above.