STATELESSNESS IN AUSTRALIAN REFUGEE LAW: THE (RENEWED) CASE FOR COMPLEMENTARY PROTECTION

CHRISTOPHER RICHTER*

I. INTRODUCTION

The Universal Declaration of Human Rights states unequivocally that '[e]veryone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality'.[1] Yet, despite these strong words, the reality is that many people around the world are devoid of nationality. They are stateless. Since such individuals lack a nationality, they also lack 'the principal link by which they could derive benefits from International Law ... and thus they lack protection as far as [the] law is concerned'.[2] The international community has recognised that statelessness is a problem requiring special attention, and has responded to it with the creation of two conventions seeking, firstly, the elimination of future cases of statelessness, and, secondly, the protection of those already stateless. The notion of complementary protection has also evolved as a response. This concept has resulted from the recognition that there may be people who do not fall within the internationally protected category of refugees, but who should nonetheless be afforded protection because, amongst other things, they are stateless. Australia too, is beginning to take note of this problem. However, while migration has been a regular issue of contention in Australian politics since the widely reported *Tampa* incident and the 2001 federal elections,[3] the related issue of statelessness has received little attention until recently. The fact that statelessness has only become an issue in Parliament in the last few months raises the question of whether Australian law adequately protects those who are stateless and without nationality.

The extent to which Australian law does so is, therefore, the focus of this paper. It examines the international laws dealing with statelessness, the rules in foreign jurisdictions, and the existing situation under Australian refugee law. After concluding that Australia does not provide sufficient protection to the stateless, the paper discusses recent proposals that have been put forward to improve the law. It offers an argument for dedicated legal procedures of complementary protection, a system that, if implemented, could enhance the efficiency of Australia's asylum processes and provide important benefits for those applicants who are stateless.

II. THE PROBLEM OF STATELESSNESS

The issue of statelessness has received varying degrees of attention internationally, yet designation as a stateless person can have dramatic implications for the approximately 11

* LLB student, TC Beirne School of Law, The University of Queenland.

[1] *Universal Declaration of Human Rights*, GA Res 217A (III), [art 15] UN Doc A/810 (1948).

[2] L Oppenheim and H Lauterpacht, *Oppenheim's International Law Volume 1* (8th ed. 1955) 668.

[3] On the controversies surrounding Australian migration law, see generally T Magner, 'A Less Than 'Pacific' Solution for Asylum Seekers in Australia' (2004) 16(1) *International Journal of Refugee Law* 53.

million people worldwide[4] who are without citizenship or nationality. Under international law, nationality is considered an essential ingredient in acquiring rights for the individual.[5] It is the 'right to have rights.'[6] As such, those without a legal link to a particular state are forced to go without the rights and protections typically afforded to a state's nationals—'they cannot work, own property, access education or health care, travel, register births, marriages or deaths, or seek national protection.'[7] The lack of legal rights for stateless persons has led to them being referred to as 'anomalies',[8] and, somewhat dramatically, as 'a kind of flotsam ... without legal existence'.[9]

The causes of statelessness are varied, although the most widely cited cases are those that were a result of State succession, notably in the former Yugoslavia and the Soviet states.[10] However, statelessness can also arise through discrimination; renunciation of nationality; automatic loss by operation of law; denationalisation; expulsion from a territory; conflict of national laws; or administrative practices.[11] Australia has not been immune from the problem of statelessness—a number of asylum seekers who have arrived in the country have found themselves without a nationality, often because they lack any proof of identity, and the country from which they claim to have come from does not recognise their nationality, and subsequently refuses to accept them.

One particular example of this came before the Refugee Review Tribunal (RRT) in *N94/04482*.[12] The asylum applicant in this matter was an ethnic Chinese woman who had previously resided in Indonesia. Though born in the Indonesian province of Aceh, the applicant did not have Indonesian citizenship, being born to parents who, while also born in Indonesia, were not considered nationals. The reasons for this stemmed from that fact that the applicant's grandparents were Chinese nationals—it used to be the case that only children born to an Indonesian father would receive Indonesian citizenship at birth. Neither the applicant nor her parents were therefore considered Indonesian nationals. The Tribunal considered the question of whether the applicant could instead be a citizen of the People's Republic of China (PRC). However, owing to the fact that she was not born in the PRC, had never lived there, and that it is generally very difficult to determine Chinese citizenship, that conclusion could not be drawn. Adding to the applicant's problems was the fact that the only document issued to her by the Indonesian government—a Certificate of Identity, usually

---

[4] M Lynch, *Lives on Hold: The Human Cost of Statelessness* (2005) *Refugees International* [1] <http://www.refugeesinternational.org> at 22 April 2005; J Lobe, 'Rights: Plight of "Stateless Minorities" Is Growing Worse', *Global Information Network*, 16 February 2005, 1.

[5] See for example, Oppenheim and Lauterpacht, above n 2, 668-669; C A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *International Journal of Refugee Law* 232, 234-235.

[6] See for example, *Trop v Dulles*, 356 US 86, 101-102 (1958) Warren CJ; C A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 159.

[7] C A Batchelor, 'The International Legal Framework Concerning Statelessness and Access for Stateless Persons' (Contribution to the European Union Seminar on the Content and Scope of International Protection: Panel 1—Legal Basis of International Protection, Madrid, 8-9 January 2002) [3] <http://www.unhcr.ch> at 4 April 2005.

[8] Ibid.

[9] Batchelor, above n 5, 235.

[10] For other examples, see Lynch, above n 4, [7]-[10].

[11] Office of the United Nations High Commissioner for Refugees, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness* (1999) UNHCR [3] <http://www.unhcr.ch> at 4 April 2005 ('*UNHCR*'); Lynch, above n 4, [5].

[12] *N94/04482* (1995) Refugee Review Tribunal.

given to alien residents in Indonesia—had expired while the applicant was in Australia. This meant that she could not return to Indonesia, and nor could she apply for citizenship because she was outside the country. The application she had made for citizenship prior to leaving Indonesia had also lapsed while she was in Australia. The weight of circumstances meant that, for all practical purposes, the applicant was stateless.[13] The plight of this particular asylum seeker, sadly, is reflected in many other similar cases of statelessness around the world.[14]

III. STATELESSNESS IN INTERNATIONAL LAW AND FOREIGN JURISDICTIONS

The international community created two conventions in response to the problem of statelessness. The first, drafted in 1954, is the *Convention Relating to the Status of Stateless Persons*.[15] This is the primary legal instrument aimed at ensuring certain minimum rights and fundamental freedoms are accorded to stateless persons, and was designed to protect those who, because of their status, are not protected by the 1951 *Convention Relating to the Status of Refugees*.[16] In its original form, the 1954 Convention was drafted as a protocol to the *Refugee Convention*, there being no distinction made at the time between refugees and stateless persons.[17] However, it became clear during the drafting of the instrument that there may be certain people who, while stateless, did not fall within the definition of a refugee, which requires persons to show a well founded fear of persecution in order to give rise to refugee status.[18] As such, the statelessness instrument was created as a convention in its own right.

The starting point for any examination of the 1954 Convention is Article 1, which defines a stateless person as one 'who is not considered as a national by any State under the operation of its law'.[19] For persons who fall within this category, the 1954 Convention ensures certain minimum standards of protection are afforded, including, *inter alia*, access to courts, property rights and freedom of religion.[20] While Article 1 represents the internationally recognised definition of statelessness, it has been criticised as being a strictly legal one, in that it recognises only a small class of stateless persons, namely those who are stateless due only to the operation of the law of a particular country. It ignores, for example, those persons who become stateless not because of the operation of the law, but because of other factors. This has led to the differentiation, in academic and legal circles, between *de jure* statelessness and *de facto* statelessness (i.e. statelessness in law and in fact). While *de facto* statelessness is not defined in either convention, there is some literature providing assistance on its true meaning. The United Nations document *A Study of Statelessness* for example, explains that *de facto* stateless persons are those who:

---

[13] Ibid.

[14] See, eg, A Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (2003) [12, 16] UNHCR <www.unhcr.ch> at 4 April 2005.

[15] *Convention Relating to the Status of Stateless Persons* opened for signature 28 September 1954, [1960] ATS 20 (entered into force 6 June 1960) ('*1954 Convention*').

[16] *Convention Relating to the Status of Refugees,* opened for signature 28 July 1951, [1954] ATS 5 (entered into force 22 April 1954) ('*Refugee Convention*'); Batchelor, above n 7, 6.

[17] Batchelor, above n 5, 239-241.

[18] See generally, Batchelor, above n 5, 239-249; on the history of the Convention, see generally N Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (1955) UNHCR <http://www.unhcr.ch> at 10 June 2005.

[19] *1954 Convention*, opened for signature 28 September 1954, [1960] ATS 20, art 1 (entered into force 6 June 1960).

[20] Ibid arts 16, 13 and 4.

> having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.[21]

In 1961, the United Nations High Commissioner for Refugees (UNHCR) attempted to more clearly define the nature of *de facto* statelessness, stating that '[t]here are many persons who, without being *de jure* stateless, do not possess an effective nationality. They are usually called *de facto* stateless persons'.[22] The Executive Committee of the UNHCR later elaborated on this further, defining *de facto* stateless persons as those who have 'an ineffective nationality, or those who cannot establish their nationality'.[23] The nature of *de facto* statelessness therefore appears to be that a person, while not being legally stripped of their nationality, is nevertheless denied the rights typically afforded to citizens of a country, either because they cannot prove that they hold a particular nationality, or the country from which they claim to have come from does not recognise them as a national and refuses them protection, thereby rendering their legal nationality ineffective.[24]

Despite being omitted from the Article 1 definition, *de facto* stateless persons are nevertheless mentioned in the Final Act of the Convention, which recommends to each Contracting State that they consider affording the same protections to both *de jure* and *de facto* stateless persons. However, some commentators have argued that the Final Act is no guarantee that *de facto* stateless persons will be protected, owing to its non-binding nature.[25] In any event, it seems that eligibility under the Convention, whether under *de jure* or *de facto* status, is a matter for the State party to determine through its own domestic procedures.[26] The availability of domestic procedures that deal with statelessness is therefore important.

Whereas the 1954 Convention seeks to ensure that existing stateless persons are afforded certain fundamental human rights protections, the 1961 *Convention on the Reduction of Statelessness*[27] is designed to reduce future cases of statelessness. It does so by providing, in Articles 1-4, means of acquiring nationality for those who have an appropriate link with a country and who, but for the provisions, would be stateless. Article 1 for example, provides that a Contracting State shall grant its nationality to a child born in its

---

[21] The United Nations, *A Study of Statelessness*, [6], UN Doc E/1112;E1112/Add.1 (1949). See also P Weis, *Nationality and Statelessness in International Law* (2nd ed, 1979) 164.

[22] Batchelor, above n 5, 251 citing UN Doc A/CONF.9/11 (30 Jun. 1961), 4

[23] R Settlage, 'No Place to Call Home: Stateless Vietnamese Asylum Seekers in Hong Kong' (1997) 12 *Georgetown Immigration Law Journal* 187, 190 citing EXCOM Conclusions No. 78 (1995)

[24] See E Simperingham, *The International Protection of Stateless Individuals: A Call For Change* (B Laws Thesis, University of Auckland, 2003) 3. The distinction between the two classes of statelessness is further confused, however, because some academics have insisted on using the terms '*de jure*' and '*de facto*' to distinguish stateless people from refugees — the former lacking protection in law, and the latter lacking protection in fact (i.e. because refugees might have a nationality in law, but lack protection in fact where they are persecuted by their own governments): see N Nathwani, *Rethinking Refugee Law* (2003) 12-17; N Nathwani, 'The Purpose of Asylum' (2000) 12 *International Journal of Refugee Law* 354, 357, 361-364. Some also argue that the concept of *de facto* statelessness is itself an illogical one: see N Robinson, above n 18, 1.

[25] Batchelor, above n 6, 170-175.

[26] UNHCR, above n 11, 11.

[27] *Convention on the Reduction of Statelessness,* opened for signature 30 August 1961, [1975] ATS 46 (entered into force 13 December 1975) ('*1961 Convention*').

territory and who would otherwise be stateless.[28] Similarly, Article 4 provides that nationality shall be granted to a person who, because they have passed the date of nationality lodgment or do not meet the requirements, cannot be granted nationality in their country of birth (provided that the nationality of one of the child's parents is that of the conferring state).[29] Articles 5 to 7 deal with the loss or renunciation of nationality, and attempt to make both situations conditional on the prior possession or assurance of acquiring another nationality.[30] This condition is also found in Article 8, which prohibits Contracting States from depriving a person of their nationality if this would result in statelessness. The remaining provisions include, *inter alia*, a prohibition on depriving nationality on racial, ethnic, religious or political grounds;[31] measures for reducing statelessness due to transfers of territory;[32] and for resolving disputes between Contracting States over the interpretation or application of the Convention.[33]

Despite providing the internationally recognised definition of statelessness, the determination of a person's status under the Conventions is left to each individual state, which has resulted in a lack of uniformity in identification processes. In some states international conventions can have direct application in the domestic realm, whereas in others (such as Australia) implementing legislation must be enacted before international rules become part of the domestic law.[34] In either case, the procedures for determining statelessness (if, indeed, there are any) can be widely varied. Carol Batchelor, for example, produced a report for UNHCR in 2003 highlighting the different approaches amongst members of the European Union (EU). Amongst her findings were that, at the determination stage, only Spain has procedures created by legislation, while Italy has an implementing decree empowering the Ministry of Interior to determine statelessness.[35] France and Germany have certain procedures not conferred by legislation, while in other countries such as Austria, where there are no specific procedures, the issue of statelessness is incidental to the determination of the identity of a foreigner, assessment of residence permits, and the like.[36] These differences can extend not just to the procedures for determining status, but also to the rights, duties and benefits that are conferred on individuals once this has been determined, although there are also some commonalities. Most (though not all) EU countries for example, recognise that certain forms of stay may be granted to avoid the possibility of indefinite detention. However, this right is not always automatic (except in France, Italy and Spain, where statelessness leads to residence).[37] In countries where there is no automatic right to stay, entry to the country may nevertheless be granted on humanitarian grounds, and in many cases (whether automatic or otherwise) it may be conditional on the individual continuing to fulfil certain requirements during their stay, particularly where the right is granted for a defined period with no automatic renewal.[38]

---

[28] Ibid art 1.
[29] Ibid art 4.
[30] UNHCR, above n 11, 14.
[31] *1961 Convention*, opened for signature 30 August 1961, [1975] ATS 46, art 9 (entered into force 13 December 1975).
[32] Ibid art 10.
[33] Ibid art 14.
[34] See R Germov and F Motta, *Refugee Law in Australia* (2003) 89.
[35] C A Batchelor, 'The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation' (2004) 22(2) *Refuge* 19-20.
[36] Ibid 20-21.
[37] Ibid 29-30.
[38] Ibid.

While a substantial number of European countries lack formal procedures for determining statelessness, it appears that many of them are nonetheless attempting to deal with the problem through various *ad hoc* methods.[39] In many instances administrative or judicial authorities have taken on the role of considering individual cases of statelessness, usually in a humanitarian or complementary protection context,[40] though Batchelor maintains that a lack of defined procedures can nevertheless prove to be an obstacle for some countries.[41] The UNHCR has also noted that while many countries have adopted *ad hoc* approaches to the issue, 'few national registration systems are equipped to accurately identify ... stateless persons on a State's territory'.[42] This tends to indicate that the *ad hoc* approaches being utilised are generally insufficient to deal with statelessness in an adequate manner. Importantly however, the EU as a whole is attempting to move away from these types of responses to a more unified and formal system of complementary protection, recognising that there are people who do not fit within the international definition of 'refugee'.[43] This is significant, not only in terms of EU harmonisation, but also because of the recognition it gives to the stateless and to other persons who are outside the *Refugee Convention* framework, but who are in need of international protection. It is clear that European countries are now recognising the importance of dedicated and substantive responses to statelessness.

IV. STATELESSNESS IN AUSTRALIAN LAW

The situation in Australia is, again, different. Here, statelessness is given only minimal attention. Indeed, the law is virtually silent on the issue, particularly as it relates to the protection of those who are already stateless, despite Australia being party to the 1954 Convention. As with countries such as the United Kingdom (UK), Denmark, Finland and Ireland, [44] there are no specific procedures for determining statelessness, and nor are there any legislative enactments implementing the 1954 Convention. It seems that in Australia, as with those European countries, the issue arises incidentally to the procedures for the determination of asylum applications. In that regard, Australian law focuses primarily on the rules surrounding refugees, having, through the *Migration Act,*[45] implemented various aspects of the *Refugee Convention.*

In fact, the Convention definition of 'refugee' provides the basis for Australia's determination process—in order to be accepted into Australia with a protection visa, asylum

---

[39] Batchelor, above n 35, [59]; see also Executive Committee of the High Commissioner's Programme, *Stateless Persons: A Discussion Note*, 43rd sess, 18th mtg, [24] UN Doc EC/1992/SCP/CRP.4 (1992) ('*UNHCR Discussion Note*').

[40] Ibid [28], [51].

[41] Ibid [49].

[42] UNHCR 'Executive Committee of the High Commissioner's Programme Standing Committee, 21st meeting 'UNHCR's Activities in the Field of Statelessness: Progress Report' (2001) 13 *International Journal of Refugee Law* 702, 703.

[43] J McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461; see also J McAdam, *Seeking Refuge in Human Rights? Qualifying For Subsidiary Protection in the European Union* (2004) Forced Migration Online <http://www.forcedmigration.org/events/prague2004/mcadam-paper.pdf> at 23 August 2005.

[44] In relation to these European countries, see Batchelor, above n 35, 21.

[45] *Migration Act 1958* (Cth).

seekers must meet the international definition.[46] This is found in article 1A(2) of the Convention, which states that a refugee is any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[47]

The primary decision-making process for determining refugee status under this definition commences with an initial assessment at the point of entry (be that in an airport, seaport, or elsewhere), followed by a more detailed assessment within Australia (for lawful non-citizens[48]), or at a detention centre (for unlawful non-citizens[49]).[50] These assessments are conducted by officers from DIMIA. Whether in detention or otherwise, an asylum seeker must lodge a temporary protection visa application form showing that they meet the definition of 'refugee' under the terms of the Convention. In determining individual cases, the DIMIA case officer can have regard to the written application form on its own, or they may also undertake further interviews with the applicant or seek more detailed written information.[51] They should, as a matter of course, refer to information from sources such as the Department of Foreign Affairs and Trade (DFAT) on, for instance, the applicant's country of origin.[52] Failure to meet the requirements of the refugee definition will result in the applicant being removed from Australia, although there is a right of appeal to the RRT or, in special circumstances, to the Administrative Appeals Tribunal (AAT). From those, appeal is also available to the Federal Court or High Court, though this is strictly limited to appeals on matters of law. The Federal Court cannot, for example, overturn a decision and grant a protection visa itself. It can only uphold a prior decision, or order a reassessment by the RRT.[53] The Immigration Minister also has a power under s417 of the *Migration Act* to grant a protection visa on humanitarian grounds, even where the initial application was rejected.[54] However, the Minister has a discretion as to whether the power will be exercised and cannot be compelled to do so.[55] Where a decision is made under this section, it is final and non-reviewable.

---

[46] For a critical discussion of the refugee determination process, see A Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14(23) *International Journal of Refugee Law* 302.

[47] *Refugee Convention,* opened for signature 28 July 1951, [1954] ATS 5, art 1A(2) (entered into force 22 April 1954).

[48] 'Lawful non-citizen' means 'a non-citizen in the migration zone who holds a visa that is in effect': *Migration Act 1958* (Cth) s13.

[49] 'Unlawful non-citizen' means simply 'a non-citizen in the migration zone who is not a lawful non-citizen': *Migration Act 1958* (Cth) s14.

[50] Legal and Constitutional Committee, The Australian Senate, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) [4.4] ('*A Sanctuary Under Review*').

[51] See J Burn and S Reich, *The Immigration Kit: A practical guide to Australia's immigration law* (7th ed, 2005) 450.

[52] Ibid 449-450.

[53] M Crock and B Saul, *Future Seekers: Refugees and the Law in Australia* (2002) 58-62. For a discussion of other restrictions placed on this right of appeal, see R Lindsay, 'Who Is A Refugee, How Are They Processed and the Government Reforms' (2002) 32 *AIAL Forum* 5, 9.

[54] Crock and Saul, above n 53, 62.

[55] See, eg, Burn and Reich, above n 51, 458.

While this procedure appears to provide those seeking entry as refugees with fair access to Australian courts and tribunals, it does little for those who are stateless. This is because, in Australia, the determination process is strictly limited to those that fall within the terms of the *Refugee Convention*, which itself contains a number of restrictions.[56] It is true that a person can, under the Convention definition, be both a refugee and stateless, in which case the applicant's claim could succeed under the *Refugee Convention*. However, for those who are merely stateless, and cannot also claim refugee status, the existing process only allows a proper consideration of non-*Refugee Convention* issues (such as statelessness) at the appeal stage. Even then, review is still largely concerned with the extent to which an applicant meets the refugee definition; other issues are purely incidental in the sense that they will confer protection on individuals only if they fit within the Convention framework.[57] A line of Australian cases makes it abundantly clear that statelessness in itself cannot give rise to protection; that the *Refugee Convention* does not protect the stateless; and that stateless persons in Australia will only receive benefits if they fall within the scope of that Convention. In *Rishmawi v Minister for Immigration and Multicultural Affairs* for example, Cooper J, in interpreting the *Refugee Convention*, held that its overall purpose was to 'provide sanctuary to persons who had a well founded fear of persecution for a Convention reason and not for any other reason'.[58] Similarly, in *Al-Anezi v Minister for Immigration and Multicultural Affairs*, Lehane J stated that 'a stateless person was to be regarded as a refugee only if he or she was in the first place outside the country of former habitual residence as a result of a well-founded fear of persecution for a Convention reason',[59] while in *Minister for Immigration and Multicultural Affairs v Savvin*, the Federal Court held that 'the fear of being persecuted ... is the talisman of the definition', and that it requires 'that a stateless person, being outside the country of his former habitual residence, have a well-founded fear of being persecuted for a Convention reason'[60] in order to be granted protection. These decisions reflect the fact that, in Australia, statelessness is to a large extent subordinated by both the focus of the determination process on refugee status, and the lack of a formal system of complementary protection.[61]

A cursory examination of RRT decisions also reveals this fact, and can provide an illustration of the practical effects this has on applicants. Because asylum seekers must show a well founded fear or persecution, statelessness is often raised as a possible cause of that persecution, notwithstanding that it is unlikely to give rise to protection. These claims are usually made in conjunction with some other reason such as ethnicity. In *N02/43850* for example, an applicant claimed that he feared persecution in Latvia because of his statelessness and Russian ethnicity.[62] Similarly, in *N99/29186*, the applicant, a stateless Bedouin, sought refugee status in Australia on the basis that people in his situation were

---

[56] Germov and Motta, above n 34, 102-108.

[57] For a discussion of the grounds of protection under the *Refugee Convention*, see M Crock, *Immigration and Refugee Law in Australia* (1998) 143-153.

[58] (1997) 77 FCR 421, 427; for discussion of this case, see Germov and Motta, above n 34, 154-155.

[59] [1999] FCA 355 [20]; see also Germov and Motta, above n 34, 155-156.

[60] *Minister for Immigration and Multicultural Affairs v Savvin* [2000] FCA 478 [7],[8] (Spender J); see also Germov and Motta, above n 34, 156-157.

[61] For a critical discussion of overemphasising the *Refugee Convention* to the detriment of other obligations, see A Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 *International Journal of Refugee Law* 293.

[62] *N02/43850* (2003) Refugee Review Tribunal; see also *N02/42747* (2003) Refugee Review Tribunal.

treated harshly in Kuwait, his country of former habitual residence.[63] However, the RRT has made it clear, following judicial authority, that 'statelessness and inability to return is not sufficient to establish refugee status',[64] and that 'mere statelessness does not constitute persecution'.[65] It is clear from this that Australian refugee law does not consider statelessness an issue that can in itself give rise to protection, despite the harsh effects that such a status will cause. By restricting the forms of protection available to that under the *Refugee Convention*, the current determination process therefore fails those who are in need of protection but who do not fall within the terms of the Convention. In practical terms, the system forces stateless applicants to undertake a lengthy and costly asylum process that may not even give a proper consideration to their situation because they are not 'refugees'. [66]

What then, of laws conferring rights, duties and protections on the stateless? Again, Australian law is silent on that point. Unlike those European countries that are also without dedicated procedures for determining statelessness, but that nonetheless deal with the issue through *ad hoc* measures, Australian law does little for people who are subsequently discovered to be stateless. Indeed, under the current system, failure to meet the *Refugee Convention* definition either at the initial stage or on appeal, would require immediate removal from Australia. This would be effected, under section 181 of the *Migration Act*, 'as soon as practicable'.[67] In effect, this means that Australian law washes its hands of the problem of statelessness by sending failed applicants elsewhere (if, indeed, that is even a practical possibility). While courts here have acknowledged that stateless persons who fall outside the ambit of the *Refugee Convention* are still covered by the 1954 *Statelessness Convention*, these acknowledgements only appear in brief obiter comments.[68] In any event, such statements refer to the position in international law, and make no reference to the situation under Australia's domestic laws. This is due to the fact that Australia has not incorporated the provisions of the 1954 or 1961 Conventions into domestic legislation,[69] which might therefore lead to the unsatisfactory conclusion that Australian law provides insufficient protection to the stateless, and does not, by that fact, fully meet Australia's international obligations. Legal and political discourse in the country acknowledges this fact—in the RRT decision of *N94/05036* for instance, the Tribunal stated, somewhat boldly, that the existence of the *1954 Convention* is cold comfort to applicants, because 'Australia has made no specific provision under its domestic law to put into effect its obligations under that Convention'.[70] It is exactly these types of issues that have raised concerns for the UNHCR. In a 1992 report for example, the Executive Committee stated that '[t]he problems resulting from statelessness do not stem from the absence of an international legal framework', but '[r]ather, problems arise because there is not sufficiently widespread adherence to, or implementation of these instruments'.[71] Australian law therefore fails

---

[63] *N99/29186* (1999) Refugee Review Tribunal.

[64] *N02/43850*, above n 49 [59].

[65] *N98/23801* (2001) Refugee Review Tribunal.

[66] This has also been raised as a problem in relation to other non-*Refugee Convention* obligations, such as under the *International Covenant on Civil and Political Rights* and the *Convention Against Torture*: Senate Committee on Ministerial Discretion in Migration Matters, The Australian Senate, *Inquiry into Ministerial Discretion in Migration Matters* (2004) 135 ('*Ministerial Discretion Report*').

[67] *Migration Act 1958* (Cth) s181.

[68] See, for example, *Diatlov v Minister for Immigration and Multicultural Affairs* [1999] FCA 468, [30] (Sackville J).

[69] Although Australian law does contain some provisions for the prevention of future cases of statelessness: *Australian Citizenship Act 1948* (Cth) s10B, 23D, 18; see generally Burn and Reich, above n 51, [23.9]-[23.13].

[70] *N94/05036* (1994) Refugee Review Tribunal.

[71] UNHCR Discussion Note, above n 39, [7].

stateless persons on two primary counts: firstly, the process for determining asylum claims does not consider statelessness a substantive issue of concern. With no form of complementary protection in place, the current system subordinates issues such as statelessness. Secondly, for those who nevertheless show up throughout the process as being stateless, Australian law offers no protections because the relevant conventions have not been implemented domestically.

DIMIA has consistently raised the argument that domestic implementation of international obligations is not necessary, because the Minister's discretion under s 417 provides an adequate safety net. The Department has argued for instance, that

> [w]hile migration legislation includes provisions that embrace Australia's obligations under the Refugees' Convention ... there are no migration provisions regarding Australia's international obligations under instruments such as the United Nations Convention Against Torture (CAT) or the International Covenant on Civil and Political Rights. The ministerial discretion powers ... are used to enable Australia to meet those obligations ...[72]

However, this view has been widely criticised, and there are some doubts as to the suitability of the Minister's discretionary powers to adequately protect people who do not meet the normal criteria.[73] This is particularly the case in relation to stateless asylum seekers, because unlike the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[74] the *Convention on the Rights of the Child*[75] and the *International Covenant on Civil and Political Rights*,[76] the two statelessness conventions are not specifically identified as factors to be considered when exercising the discretion,[77] which again reflects the subordinate nature of statelessness and the inadequate provisions dealing with it in Australian law.

The lack of formal protection for those who fall outside the scope of the *Refugee Convention* has been exacerbated by recent decisions of the High Court regarding indefinite detention. In *Al-Kateb v Godwin*,[78] heard at the same time as *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*,[79] the High Court handed down a decision permitting the indefinite detention of failed asylum seekers awaiting removal. The primary question before the Court was whether the proper interpretation of sections 189, 196 and 198 of the *Migration Act* allowed detention for an indefinite period. Of particular concern was s196, which states that:

---

[72] Ministerial Discretion Report, above n 66, [8.17]; see also Schloenhardt, above n 46, 320-321.

[73] On the debate surrounding Ministerial discretion, see generally Ministerial Discretion Report, above n 66, chapter 8.

[74] Opened for signature 10 December 1984, 1989] ATS 21 (entered into force 23 March 1976).

[75] Opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

[76] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[77] Guidelines on Ministerial Powers Under Sections 345, 351, 391, 417, 454 and 501J of the *Migration Act* 1958, Annex 1 of *Australia's Fourth Report Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2005) Attorney General's Department <http://www.ag.gov.au> at 23 August 2005; see also *Ministerial Intervention Following a Decision of a Review Tribunal* (2004) Immigration Advice and Rights Centre <http://www.iarc.asn.au/publications/pdfs/cis13.pdf> at 23 August 2005.

[78] [2004] HCA 37; for a general discussion of this case, see J Allan, '"Do the Right Thing" Judging? The Australian High Court in Al-Kateb' (2005) 24 *University of Queensland Law Journal* 1.

[79] [2004] HCA 38.

> An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
> (a) removed from Australia under section 198 or 199; or
> (b) deported under section 200; or
> (c) granted a visa.[80]

Chief Justice Gleeson considered that this section could have two meanings. He stated, for example, that it

> could mean that the appellant is to be kept in administrative detention for as long as it takes to remove him, and that, if it never becomes practicable to remove him, he must spend the rest of his life in detention ... It may [also] mean that the appellant, who is being kept in detention for the purpose of removal, which must take place as soon as reasonably practicable, is to be detained if, and so long as, removal is a practical possibility, but that if, making due allowance for changes in circumstances, removal is not a practical possibility, then the detention is to come to an end, at least for so long as that situation continues.[81]

The Court held in a 4-3 majority that the first construction was the right one, and that failed asylum seekers should remain in detention pending their removal, notwithstanding the fact that such removal is not a practical possibility in the circumstances. This decision is illustrative of the potential dangers that stateless persons can fall into because of their status, particularly where there are no procedures recognising them as a category of persons to who protections must be afforded. The prospect of indefinite detention is almost always raised as one of the major problems that statelessness can give rise to—stateless persons, by the mere fact of their statelessness, are often not granted entry to any country, and are detained indefinitely as a result.[82] Asylum seekers in Australia who fail to meet the refugee criteria, but who cannot be removed from the country because they are stateless, would therefore face the very real prospect, due to this judgment, of indefinite detention.

However on the 23rd of March 2005 however, Immigration Minister Amanda Vanstone announced a new class of bridging visa aimed at reducing the harsh effects of the decision in *Al-Kateb v Godwin* for long term detainees. This new document, called a Removal Pending Bridging Visa, will apply to all those detainees who:

> the Minister believes it is not reasonably practicable to remove for the time being; and
> the Minister believes have done everything possible to facilitate their removal from Australia.[83]

The visa affords certain support benefits for those to whom it is applicable, including work rights and job matching, access to Medicare benefits, public education for school aged minors, and access to Early Health Assessment and Intervention (EHAI) and English as a Second Language (ESL) services for school aged minors.[84] The Return Pending Bridging

---

[80] *Migration Act 1958* (Cth) s196.
[81] *Al-Kateb v Godwin* [2004] HCA 37, [14].
[82] K Jastram and M Achiron, *Refugee Protection: A Guide to International Refugee Law* (2001) 88 UNHCR <http://www.unhcr.ch> at 4 April 2005; see also A Brouwer, above n 14, 33.
[83] A Vanstone, Minister for Immigration, 'Broader Powers for Immigration Minister to Manage Long Term Detainees and Removals' (Press Release, 23 March 2005).
[84] Ibid.

Visa will, because of these benefits, significantly enhance the rights of stateless people in Australia, particularly given that in the previous situation they were afforded precious few rights at all. Indeed, the federal government has openly acknowledged that the plight of asylum seekers who fail the refugee definition but who cannot be removed from the country for lack of nationality (or proof of nationality) was a consideration for the new changes.[85]

In the short time that the visa has been available, the government has already amended its requirements so that more long-term detainees could potentially benefit.[86] In its original form, the visa required, in addition to the elements mentioned above, that asylum seekers had no visa applications or litigation outstanding, and agreed in writing to abide by all prescribed conditions, and to cooperate fully with arrangements for their removal from Australia, including leaving the country when advised to do so.[87] Those provisions were removed however, amidst criticism from members of parliament and human rights groups alike.[88] While the benefits provided by the visa and the subsequent changes to it are positive, the measure amounts only to a response to situations that the determination system as a whole helps to create, and not as a proper response to the problem of statelessness. The RPBV merely represents the type of *ad hoc* solution that the EU is trying to move away from. It should be remembered that the purpose of the RPBV is to alleviate the effects of mandatory detention for those awaiting removal from Australia—it offers protections in that context and that context only. Stateless asylum seekers would therefore receive benefits under the RPBV only if they cannot be removed from the country. They receive no benefits by virtue of being stateless, or where their removal is a practical possibility. Yet again, this reflects the fact Australian refugee law gives insufficient consideration to the problem of statelessness.

V. Proposals for Reform and Complementary Protection

A number of plans have been advanced to remedy this situation. As recently as May 2005, Victorian Liberal MP Petro Georgiou announced plans to introduce draft laws aimed at overturning the Australian Government's current mandatory detention system. According to news reports, Mr Georgiou's proposals included a limitation on the time spent in detention for all asylum seekers. Under the plan for example, DIMIA would be allowed to detain people for a maximum of 90 days for the purpose of assessing applications and verifying identity, after which, the department would be required to apply for Federal Court orders to keep the person detained.[89] For those who have already been in detention for more than a year, release would be allowed provided that the applicant posed no danger to the public.[90] More significantly however, for the purposes of this paper, failed asylum seekers who

---

[85] Ibid. See also ABC Radio, 'Federal Government considers creating new visa for long term detainees', *The World Today*, 22 March 2005 <http://www.abc.net.au/worldtoday/content/2005/s1329057.htm> at 19 April 2005.

[86] A Vanstone, Minister for Immigration, 'More Long-Term Detainees to be Considered for the Removal Pending Bridging Visa' (Press Release, 16 June 2005).

[87] Ibid.

[88] B Burton, 'Rights-Australia: Rights Groups Hit New Plan for 'No Hope' Visas', *Global Information Network* (New York), 23 March 2005; Though the changes to the RPB Visa have themselves been criticised as insufficient: AAP, *Visa Changes 'Crumbs off the Table'* (2005).

[89] Maria Hawthorne, *Lib MP bid for detainees release* (2005) AAP.

[90] Ibid.

cannot be removed from the country because they are stateless would become eligible for a permanent visa, subject to meeting certain character tests.[91]

The potential for these proposals to undermine Liberal Party unity on its mandatory detention system led to the Government undertaking talks with Mr Georgiou and his supporters to find a common ground on the issue of immigration detention.[92] The result of these talks was the introduction into Parliament of the DIMIA backed *Migration Amendment (Detention Arrangements) Bill 2005 (Cth).*[93] The most important features of this bill are the powers it gives the Immigration Minister to grant visas on public interest grounds, even where no formal application has been lodged, and the power to allow applicants to reside in a place other than detention centres while their asylum applications are assessed.[94] The former of these changes will potentially benefit stateless applicants, because if it becomes clear that a person will not meet the refugee definition and cannot practicably be removed from the country, the Minister may nonetheless grant a visa. The bill makes clear however, that the Minister does not owe a duty to exercise this power, even when requested to do so by any person.[95] It will therefore be up to the Minister to decide when this power will be used, and because of that, it may not benefit every applicant.

Whether or not the Government's or Mr Georgiou's draft laws will succeed in parliament is yet to be seen (Greens Senators Bob Brown and Kerry Nettle introduced Mr Georgiou's proposals in their own private members bills[96]). In any event, while each bill does contain positive provisions for the stateless, they still do not introduce a more formalised procedural mechanism for determining asylum claims that fall outside the *Refugee Convention* framework, and in that respect do not considerably improve the determination process itself. The expanded Ministerial powers introduced by the bill do not appear to be substantially different to those under s417 of the *Migration Act.* The arguments surrounding the adequacy of s417 as a safety net could therefore also be applied to these new powers. Additionally, the bills (as with the RPBVs) only reflect political controversies surrounding mandatory detention, and tend to perpetuate the subordinate status that statelessness receives in Australian law by conferring protection only where there is no practical alternative. They do not represent a substantive response to the issue of statelessness.

In April 2004 however, the Refugee Council of Australia released its own proposal that relates more specifically to the problem of statelessness, and that highlights the benefits of a dedicated procedural framework. This proposal takes as its basis the notion of complementary protection, a system that 'applies to people who do not meet the formal definition of a refugee but have issues around safety of return or general humanitarian issues'.[97] It acknowledges that the *Refugee Convention* does not encompass all people in need of protection, and seeks to cover those who fall outside its ambit with, as the name suggests, 'complementary protection'.[98] This issue has received substantial consideration at

---

[91] Ibid.

[92] E Colman and D Shanahan, 'Coalition Stumbles over Detention Policy', *The Australian* (Australia), 26 May 2005, 1.

[93] S Mathieson, 'Govt Introduces Detention Bill', *The Sunday Telegraph* (Australia), 21 June 2005 <http://www.sundaytelegraph.news.com.au/0,9362,15690418-1702,00.html> at 30 June 2005.

[94] *Migration Amendment (Detention Arrangements) Bill 2005 (Cth)* ss195A, 197AB.

[95] *Migration Amendment (Detention Arrangements) Bill 2005 (Cth)* s195(A)(4).

[96] See *Migration Amendment (Act of Compassion) Bill 2005 (Cth)*; and *Migration Amendment (Mandatory Detention) Bill 2005.*

[97] *Submission to Senate Committee on Ministerial Discretion in Migration Matters*, The Australian Senate, Canberra, March 2004, [17].

[98] See generally, The Refugee Council of Australia, The National Council of Churches Australia and Amnesty International Australia, *Complementary Protection: The Way Ahead* (2004)

the international level, and is the primary objective of the UNHCR document *Agenda for Protection*, which was affirmed by a number of states, including Australia, after a two year consultation on the *Refugee Convention*.[99] It has also been the focus of the legal harmonization processes in the European Union, mentioned above, which are designed to adopt complementary protection into regional immigration law.[100] The current political tensions in Australia regarding immigration policy could be resolved by the introduction of complementary protection in the domestic context. This would also bring Australia in line with its international obligations, particularly under the two statelessness conventions.

In this respect, the model proposed by the Refugee Council of Australia represents a particularly attractive option, in that it introduces a dedicated process for dealing with protection applications that fall outside the *Refugee Convention* definition. Under this model, the initial assessment of asylum seeker applications would include a consideration of *both* the refugee definition and other complementary forms of protection, rather than being limited to the former.[101] Where an application is refused (either under the refugee definition or other measures), consideration can also be given to complementary protection during merits review in the RRT, thus making it available at all stages of the process.[102] This substantially improves the existing situation, in which such matters arise only at the later review stages, and even then, only as incidental and non-substantive elements to the refugee question. The Refugee Council highlighted in its proposal a number of other benefits that complementary protection could provide Australian refugee law, including, *inter alia*, enhancing the efficiency of both DIMIA and the RRT, reducing the time asylum seekers spend in detention by considering relevant claims simultaneously, ensuring that protection is afforded at the earliest possible time, and contributing to significant cost savings for the determination bodies.[103]

The biggest problem facing this proposal however, is the fact that Australian governments have consistently rejected the introduction of complementary protection, notwithstanding that Senate committees have recommended its implementation.[104] Amongst the arguments put forward by Government bodies was the contention that, under previous *Migration Act* provisions allowing protection based on humanitarian considerations, the number of entry approvals blew out 'from 226 in 1981-82', when the measures were not yet in place, 'to 3,260 in 1987'[105] when they were in place. The basis of this argument is therefore that assessing asylum claims on complementary humanitarian grounds can dramatically and unnecessarily increase the number of applicants who are granted entry. Implicit in this argument is also the fact that the determination process would be snowed under by applications that make vague claims in relation to a host of international conventions and humanitarian considerations, including the statelessness conventions.

<www.refugeecouncil.org.au/docs/current_issues/Complementary_Protection_model_files/Complementary%2520Protection%2520Model-.doc> at 14 May 2005.

[99] Ministerial Discretion Report, above n 66, [8.59].

[100] Ibid 140. The Refugee Council of Australia, above n 98, 2.

[101] For a useful graphic representation of the process, see the Refugee Council of Australia, above n 98, [3.1].

[102] Ibid.

[103] Ibid [4].

[104] *Ministerial Discretion Report*, above n 66, 143-145.

[105] Ibid [8.73].

This criticism however, is simply not tenable.[106] The problems foreseen in this argument can be avoided by predetermining the matters that will be taken into account, and reconstituting them as criteria that applicants must meet before being granted complementary protection. With specific and dedicated procedures in place, the potential for dramatic increases in successful asylum claims can be mitigated, if not avoided outright. A number of Australia's leading immigration law experts agree. Dr Mary Crock for one, has told a Senate Committee that, in relation to other forms of complementary protection, 'criteria ... can be articulated without opening the floodgates and [government] losing precious control of the migration process. The criteria are to be found in the human rights enshrined in international law'.[107] For the purposes of the current paper therefore, it is argued that the definition of statelessness under the 1954 and 1961 Conventions should be introduced as such a criterion, in a similar manner to which the refugee definition is currently the determinative factor for temporary protection claims. In addition to the Convention definition however, consideration should also be given to those who are not legally stateless, but nonetheless find themselves in the position of being *de facto* stateless. The specific conditions under which protection is *not* provided by the statelessness conventions could also be included, so that only legitimate claims will give rise to protection.[108] This could be supplemented by the character and health tests that are already requirements in Australian migration law, again ensuring that asylum seekers not only have legitimate claims, but that they also pose no danger to the Australian public.[109]

In addition to the arguments put forward by government bodies regarding complementary protection, the question can be raised, in light of the current changes to migration policy, whether it remains necessary to introduce such a system at all. It is arguable for example, that the bills currently before Parliament, particularly those seeking permanent stay for those who cannot be removed, would resolve the potentially harsh effects of statelessness, without a definitive determination having to be made as to a person's lack of nationality. As stated earlier however, it remains to be seen whether these bills will be passed as law. If they are not, then the situation will remain the same for stateless asylum seekers, and their position in Australian law will not be significantly improved. If the bills are passed, their application to asylum seekers will only be available once a final determination of a valid application has been made. The proposed section granting permanent residence for example, applies to people who have been subject to an order for removal for a period of 1095 days (three years) following the final determination of a valid visa application.[110] While this section would potentially benefit stateless persons, it would therefore only do so once their application has been rejected at first instance or on appeal, and in that respect maintains the potentially lengthy process that currently exists. If however, a dedicated process were in place, applicants who are likely to fail in their asylum claims and who are unlikely to be able to be removed from the country can be identified at an earlier stage of the process. This could provide a greater level of certainty for both the

---

[106] But see K U Kjær 'The Abolition of the Danish de facto Concept' 15 *International Journal of Refugee Law* 254, which discusses the abolishment of *de facto* protections in Danish law because of the high number of applicants being granted protection outside the *Refugee Convention* framework.

[107] M Crock, Submission to Senate Committee on Ministerial Discretion in Migration Matters, in *Ministerial Discretion Report*, above n 66, [8.78].

[108] The *1954 Convention* does not apply for instance, to people who have committed crimes against the peace, war crimes, crimes against humanity, or serious non-political crimes: UNHCR, above n 11, 11.

[109] As to health and public interest requirements, see generally J Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (2005) 188-189.

[110] *Migration Amendment (Act of Compassion) Bill 2005 (Cth)* s196F.

applicant and the decision maker, giving advanced notice of the mechanisms that should be applied to the individual (for example the possibility of permanent stay).

Procedures that are specifically designed to deal with statelessness could provide other benefits. Australia for example, would bring itself more into line with international developments, including its own ratifications of the two statelessness conventions, and the *Agenda for Protection* document. This is particularly the case given that 'Australia is one of the few countries in the developed world that does not have a system for complementary protection'.[111] Admittedly, while complementary protection is still an evolving concept internationally, the fact that many countries, particularly in Europe, have nonetheless moved to implement it in some form should provide impetus for the Australian government to do likewise. Additionally, Australia would have an opportunity, through a procedural framework, to examine the broader causes of statelessness, and to develop responses accordingly. Even if the current bills were passed by Parliament, this could not be achieved without dedicated procedures, because the proposed amendments focus more on the fact that a person cannot be removed from the country, rather than on the particular circumstances of the person's statelessness. As Carol Batchelor has argued, even where a state grants leave to remain on humanitarian or non-removability grounds, though no specific finding of statelessness has been undertaken (essentially resolving some of the practical problems of statelessness), this

> does little to identify cases of statelessness generally and, therefore, misses an opportunity to address the broader question of identifying increased flows of stateless persons due to changed circumstances in their countries of origin.[112]

Therefore, instead of focussing on a person's non-removability, dedicated procedures could identify why and how a person became stateless. This information could in turn be used to create further responses to the problem, and 'could serve as a critical early-warning mechanism to help both States of origin and receiving States address unfolding root causes of statelessness'.[113]

Thus, the benefits of a system of complementary protection for Australia include, practically, a streamlining of the assessment process, such that statelessness is addressed at an earlier stage and as a more formalised consideration, rather than an incidental one (benefiting applicants); providing a means through which DIMIA can identify stateless persons and to consider how to properly deal with them (either through permanent residence or otherwise); reducing the time spent awaiting application determinations; creating greater certainty of rights and duties for applicants; and fostering more consistent DIMIA decision making. From an international perspective, it would allow Australia to meet its obligations under both statelessness conventions, and to bring it into line with international developments.

As to the protections that will be afforded to those who meet the criteria, a new class of visa could be introduced that is similar to the Temporary Protection Visas given to those classed as refugees. An important aspect of any new visa class should be some limited form of stay, together with social support benefits such as those provided by the new Removal Pending Bridging Visa. Alternatively, successful applicants could be granted the protection visas already in existence. Whichever is to be used however, the 1954 Convention provides

---

[111] Ministerial Discretion Report, above n 66, [8.63].
[112] Batchelor, above n 35, 21.
[113] Ibid.

that stateless persons should be afforded rights that are, at the very least, equivalent to those contained in the Convention.[114] The most important of these would be a grant of stay. While, under the Convention, States are not *required* to grant entry on finding a person stateless, it is often the case that there is no practical alternative.[115] In Australia, this is essentially mandatory, particularly given the High Court's decision in *Al-Kateb v Godwin*. A further feature of the Convention that could be implemented is the grant of certain travel documents or identity cards. While not in themselves a sufficient replacement for other rights that might be granted under the Conventions, they might help to normalise a person's nationality situation (for example if another country was willing to accept them despite their statelessness), though they do not in themselves confer on authorities a duty to provide protection, and nor do they give the holder a right of entry.[116]

VI. CONCLUSION

Australian law currently provides inadequate consideration to the international problem of statelessness. Millions of people world wide are in the unfortunate position of being without nationality, and, because of that, are also without the fundamental rights that are consequent to it. Australia has not gone untouched by this problem—amongst asylum seekers who reach the country are a handful of people who either have no nationality by law, or have no proof of nationality leaving them stateless in fact. Yet despite being a party to both the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*, Australian laws dealing with the issue are limited.

The most telling feature of the inadequacies of the law is the fact that Australia's process for assessing asylum claims has no procedure for considering cases of statelessness. Rather, the current system makes assessments solely on an applicant's ability to meet the refugee definition contained in the *Convention Relating to the Status of Refugees*. It does not, therefore, help those who, while having a valid claim for protection, cannot meet the requisite criteria. The problems this can create for stateless people are numerous. Applicants are usually required to undertake costly and lengthy determination processes in which their claims may not be given a proper examination until the appeal or Ministerial intervention stages. Even then, there is no guarantee of success, because Australian law is clear that statelessness will not in itself give rise to protection. Additionally, failure to meet the standard of a refugee either at first instance or on appeal will lead to the applicant being removed from Australia. In some cases however, a person's statelessness can make their removal a practical impossibility, which in turn could lead to the individual remaining in immigration detention indefinitely. For those applicants who are actually determined to be stateless, Australian law offers no protection or benefits, because the 1954 Convention has not been implemented in domestic law.

The situation in Australia is currently changing—the government has created the removal pending bridging visa in an attempt to soften its migration policy, and a number of bills have been introduced into Parliament that could potentially help the stateless. However, while these changes should be welcomed, they represent more of a response to political controversies surrounding the mandatory detention policy, than to long term problems such as statelessness. It is true that the proposed bills (should they succeed in parliament) will benefit the stateless, however a dedicated complementary protection procedure aimed at

[114] Ibid 32. As to the entitlements available under the Temporary Protection Visa, see Burn and Reich, above n 44, 453-452.

[115] Batchelor, above n 34, [89].

[116] Batchelor, above n 7, [16].

identifying applicants who fail to meet the refugee criteria, but to who protection should still be afforded, is a more substantive response.