

Committee Secretary

Joint Standing Committee on Treaties

19 April 2024

Dear Secretary,

Inquiry into the *Australia-Tuvalu Falepili Union Treaty*

Thank you for the opportunity to provide this submission to the inquiry into the proposed *Australia-Tuvalu Falepili Union treaty* (the proposed Treaty).

The Peter McMullin Centre on Statelessness (PMCS) is an expert centre at the University of Melbourne's Law School that undertakes research, teaching, and public policy engagement and outreach activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific, and as appropriate more broadly.

The term 'stateless' is defined in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention) as a person 'who is not considered as a national by any State under the operation of its law'. The 1954 Convention along with the 1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention) are the key international treaties to protect stateless people and to prevent and reduce statelessness.

The United Nations High Commissioner for Refugees (UNHCR) is the UN agency mandated to identify and protect stateless people, and to prevent and reduce statelessness. In this submission we refer to the UNHCR *Handbook on Protection of Stateless Persons*.¹

Additionally, we refer to the 2022 report *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the context of Climate Change* published by PMCS, the Kaldor Centre for International Refugee Law and the University of Technology Sydney.²

¹ UNHCR, *Handbook on Protection of Stateless Persons* (2014) <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>.

² Michelle Foster, Nicola Hard, Hélène Lambert and Jane McAdam, *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the context of Climate Change* (May 2022) <https://law.unimelb.edu.au/_data/assets/pdf_file/0010/4119481/The-Future-of-Nationality-in-the-Pacific_May2022.pdf>.

1. Background

- 1.1 The 'existential threat'³ to Tuvalu from climate change is well recognised.⁴ This threat is explicitly acknowledged in the proposed Treaty as is arguably its *raison d'être*. Article 2(1) of the proposed Treaty commits both Australia and Tuvalu 'to work together in the face of the existential threat posed by climate change' and the preamble states that both States are 'resolute in reaffirming the Parties' sovereignty, territorial integrity, and political independence.'
- 1.2 Under Article 3(1) of the proposed Treaty, Australia will 'arrange for a special human mobility pathway for citizens of Tuvalu to access Australia which shall enable citizens of Tuvalu to: (a) live, study and work in Australia; (b) access Australian education, health, and key income and family support on arrival.'
- 1.3 Both Tuvalu and Australia are party to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and 1989 Convention on the Rights of the Child. These treaties respectively protect the rights of women and children to a nationality. Additionally, Australia has been party to both 1954 Statelessness Convention, as well as the 1961 Statelessness Convention since 1973. In contrast Tuvalu is not a party to either of the 1954 or 1961 Statelessness Conventions.
- 1.4 In 2015 the CEDAW Committee raised concerns regarding the impacts of climate induced displacement and emigration on the nationality status of Tuvaluans, noting a heightened risk of statelessness for this population.⁵ The Committee recommended the development of 'disaster management and mitigation plans in response to potential displacement and/or statelessness.'⁶
- 1.5 While the proposed Treaty may be seen as the kind of mitigation plan recommended by the CEDAW Committee, its silence on questions of nationality raises concerns not only in relation to its efficacy in combatting the risk of statelessness for Tuvaluans, but also its potential to exacerbate this risk. As nationality is central to both a sense of identity and

³ Australia-Tuvalu Falepili Union (2024) Article 2(1).

⁴ See Michelle Foster, Nicola Hard, Hélène Lambert and Jane McAdam, *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the context of Climate Change* (May 2022) <https://law.unimelb.edu.au/data/assets/pdf_file/0010/4119481/The-Future-of-Nationality-in-the-Pacific_May2022.pdf>. See also Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012); Jane McAdam et al, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (FNI Report 1/2016, Fridtjof Nansen Institute, and the Kaldor Centre for International Refugee Law)

⁵ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Tuvalu* (11 March 2015) CEDAW/C/TUV/CO/3-4, [31] <<https://www.ohchr.org/en/documents/concluding-observations/cedawctuvco3-4-concluding-observations-combined-third-and-fourth>>.

⁶ Ibid.

belonging, which in turn are arguably essential to the idea of human dignity, it is imperative that the proposed Treaty explicitly deal with its implications for the nationality status of Tuvaluans who utilise it, to ensure that it supports both States' commitment to 'human mobility with dignity.'⁷

2 Article 3 – Human Mobility with Dignity

- 2.1 The operation of Article 3 of the proposed Treaty in the context of the 'existential threat' to Tuvalu posed by climate change means that the 'human mobility pathway' it proposes can best be understood as a permanent residence scheme. While it is clearly envisaged that the pathway makes it possible for Tuvaluans to access the services and supports (e.g., access to 'Australian education, health, and key income and family support' as well as job opportunities) necessary to make Australia a permanent home, the proposed Treaty remains silent on how an extended or permanent existence in Australia might impact on the nationality status of Tuvaluans who access the pathway, including their ability to acquire Australian citizenship.
- 2.2 *Risk of statelessness due to the laws of Tuvalu*
- 2.3 PMCS is concerned that without the inclusion of adequate safeguards the operation of the proposed Treaty may place naturalized or registered citizens of Tuvalu at risk of statelessness.
- 2.4 Under Tuvalu's *Citizenship Act* 2008 (Citizenship Act), persons who have gained citizenship through the processes of naturalization or registration are vulnerable to deprivation of their citizenship if they fail to comply with any of the three prescribed conditions stipulated under s 6(4)(b),(c) and (f) of the Citizenship Act. Under s 6(4)(b) a naturalized citizen is required to 'intend to make Tuvalu his permanent home' and faces the risk of citizenship deprivation in instances where they do not. The citizenship loss provisions do not specify a specific timeframe of residence abroad to enliven these provisions providing decision-makers with broad discretion regarding citizenship deprivation.⁸ Persons affected by these provisions further risk statelessness as no safeguards exist in the Citizenship Act to prevent statelessness in such instances. This risk is especially heightened for naturalized citizens as they are required to renounce any other citizenship prior to naturalization.⁹

⁷ *Australia-Tuvalu Falepili Union* (2024) Article 1(b).

⁸ See further Michelle Foster, Nicola Hard, Hélène Lambert and Jane McAdam, *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the context of Climate Change* (May 2022) <https://law.unimelb.edu.au/_data/assets/pdf_file/0010/4119481/The-Future-of-Nationality-in-the-Pacific_May2022.pdf>.

⁹ *Citizenship Act* 1979 (Tuvalu) s 6(5).

- 2.5 Without clarity as to the rights of persons utilising this scheme to permanent residence and citizenship in Australia, it is unclear what the impact of the proposed Treaty will be on the nationality status of Tuvaluans, especially naturalised Tuvaluans, who migrate to Australia under the human mobility scheme. As naturalised or registered Tuvaluans risk being rendered stateless, this would undermine the States' commitment to the principle of 'human mobility with dignity' unless adequate safeguards are included within the Proposed Treaty.
- 2.6 ***Lack of clarity on access to Australian citizenship***
- 2.7 In its current form, the proposed Treaty is unclear as to whether persons would be considered permanent residents for the purposes of eligibility for Australian citizenship. Under s 21(2) of the *Australian Citizenship Act 2007* (Cth) a person must hold permanent residence status in Australia to be eligible for a grant of Australian citizenship by conferral.¹⁰
- 2.8 PMCS cautions against the development of a policy similar to that implemented for New Zealand citizens who entered Australia under the Special Category Visa between 2001 and 2022. Prior to amendments in 2023, although relevant New Zealand citizens were provided with the right to permanently reside and work in Australia under this scheme, barriers remained to their accessing Medicare and key income support payments. Further, a direct pathway to citizenship was not included within the scheme and Special Category Visa holders had to complete an additional bureaucratic step of applying for permanent residency before being eligible for citizenship via naturalization.¹¹
- 2.9 PMCS recommends that the proposed Treaty provides details regarding the visa status of persons under the human mobility scheme and pathways to Australian citizenship if these are envisaged. In particular, PMCS recommends that the proposed Treaty explicitly set out whether access to citizenship will be open to persons utilising the scheme through regular or facilitated naturalization procedures.

¹⁰ *Citizenship Act 2007* (Cth) s 21(2).

¹¹ See Department of Home Affairs, Special Category Visa (SCV): Subclass 444 <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/special-category-visa-subclass-444#Overview>>; See further Department of Home Affairs, 'Direct Pathway to Australian Citizenship for New Zealand Citizens from 1 July 2023' (22 April 2023) <<https://immi.homeaffairs.gov.au/news-media/archive/article?itemId=1047>>. see further, Paul Karp, 'New Zealanders to Gain Faster Pathway to Australian Citizenship Under Major Changes to Immigration Rules', *The Guardian* (21 April 2023) <<https://www.theguardian.com/world/2023/apr/21/new-zealanders-to-gain-faster-pathway-to-australian-citizenship-under-major-changes-to-immigration-rules>>.

- 2.10 In doing so, Australia must consider the current limitations under Tuvalu's citizenship laws that bar an individual from holding dual nationality. While the laws of Australia allow for dual citizenship, under s 7(1)(a) of the Tuvaluan Citizenship Act 1979, a citizen of Tuvalu who acquires the nationality of another country (except through marriage) may be deprived to their Tuvaluan citizenship.
- 2.11 To be true to the principle of 'human mobility with dignity' Australia should seek to provide citizens of Tuvalu an optional pathway to Australian citizenship that does not undermine their right to retain their citizenship of Tuvalu. To do so the proposed Treaty must be explicit regarding these pathways and their impacts on the citizenship status of those who utilise them. To allow Tuvaluans the opportunity to hold dual Australian and Tuvaluan citizenship, amendments would need to be made to s 7 of the Tuvaluan *Citizenship Act*.
- 2.12 ***Risk of de facto statelessness***
- 2.13 PMCS is concerned that without adequate safeguards, persons utilising the human mobility scheme under the proposed Treaty risk being rendered *de facto* stateless. While there is no definition of *de facto* statelessness under international law, UNHCR's working definition provides that a *de facto* stateless person as someone 'outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.'¹²
- 2.14 There is a risk that Tuvaluans who migrate to Australia under the proposed scheme will be left *de facto* stateless in the event that Tuvalu becomes uninhabitable due to the 'existential threat posed by climate change'. Unless affected persons acquire Australian citizenship or any other citizenship, they may be left without a country that is able to provide adequate protection. Under the Final Act of the 1961 Statelessness Convention, States are encouraged to ensure that *de facto* stateless persons benefit from the provisions in the Convention.¹³ While the Final Act has non-binding status, as a party to the 1961 Statelessness Convention, it is recommended that Australia interpret its responsibilities under international law expansively and in good faith to ensure that persons at risk of *de facto* statelessness are able to acquire an effective nationality.

¹² UNHCR, *Handbook on Protection of Stateless Persons* (2014) 3 fn 4 <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>.

¹³ UNHCR, *Handbook on Protection of Stateless Persons* (2014) 3 fn 3 <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>.

3 Recommendations

- 3.1 PMCS urges the Committee to recommend the inclusion of safeguards within the proposed Treaty to explicitly address the impacts on the citizenship status of relevant persons. Specifically, PMCS recommends that:
- a. The proposed Treaty explicitly clarifies whether access to Australian citizenship will be open to persons utilising the scheme through regular or facilitated naturalization procedures.
 - b. To align with the principle of 'human mobility with dignity' the proposed Treaty should provide citizens of Tuvalu with an optional pathway to Australian citizenship that does not undermine their right to retain their citizenship of Tuvalu, and that protects against the risk of *de facto* statelessness.
 - c. Safeguards should be added that protect against loss of Tuvaluan citizenship and the risk of statelessness for naturalised and registered citizens of Tuvalu who utilise the scheme.

Yours sincerely,

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