
Human rights issues relating to African refugees and immigrants in Australia

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Background paper for *African Australians: A review of human rights and social inclusion issues*

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This background paper was commissioned by the Australian Human Rights Commission, however this paper is an independent piece of research and reflects the views of the individual author only.

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1 Abbreviations

ACT	Australian Capital Territory
ADA	<i>Age Discrimination Act 2004 (Cth)</i>
African Charter	<i>African Charter on Human and Peoples' Rights (Banjul Charter)</i>
African Commission	African Commission on Human and Peoples' Rights
AHRCA	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
AU	African Union
AU Refugee Convention	African Union Convention Governing the Specific Aspects of Refugee Problems in Africa
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention for the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
DIAC	Department of Immigration and Citizenship (Australia)
DRC	Democratic Republic of Congo
FWA	<i>Fair Work Act 2009 (Cth)</i>
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDPs	Internally displaced persons
ILO	International Labor Organisation
JSCOT	Joint Standing Committee on Treaties (Australia)

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MWC	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
NGO	Non-governmental organisation
NPM	National Preventive Mechanism (under CAT)
OAU	Organization of African Unity
OPCAT	Optional Protocol to the Convention against Torture
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
RRT	Refugee Review Tribunal (Australia)
SDA	<i>Sex Discrimination Act 1984 (Cth)</i>
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
WSCU	War Crimes Screening Unit (Australia)

2 The human rights environment African refugees have come from

2.1 African ratification of human rights treaties

The United Nations (UN) international human rights treaties that have been ratified by African states are set out in [Appendix A](#).

Ratification and implementation of the *African Charter on Human and Peoples' Rights* (the Banjul Charter) and other African human rights treaties is set out in [Appendix B](#).

The African Charter was adopted by what was then the Organization of African Unity (OAU) in 1981. It came into force in 1986 and has been ratified by all 53 members of the African Union (AU) (Morocco is not a member).

The African Charter is effectively a system of human rights protections and obligations that operates in parallel with the UN system. It offers similar rights guarantees, but is different from the UN in important ways (Murray 2000, pp 10-11; Steiner, Alston and Goodman 2007, pp 504-507). It also carries with it reporting obligations on states and opportunities for individuals to complain (communications), which are much the same as the UN system. As a source of human rights standards, the African Charter is as available to African states as the UN treaties and will – or will not – be reflected in the domestic laws of African states in much the same way as the UN treaties.

The African Commission on Human and Peoples' Rights was established to promote the African Charter and to manage the business arising under it. In this way the arrangement mirrors the familiar UN mechanisms for promoting human rights (see generally Murray 2004, ch 2). However, the African Commission has been chronically underfunded (Murray 2004, pp 55-57) and under-regarded by the AU (Murray 2004, pp 69-71; Steiner, Alston and Goodman 2007, pp 1063-1072; Viljoen 2007, pp 416-417).

2.2 African laws that give effect to human rights treaties

There are laws in African countries that give effect to UN treaties, the African Charter and other African human rights treaties.

(a) Constitutional assumptions

African countries with an English common law heritage are 'dualist', which means that treaty obligations are not part of the domestic law unless they are enacted into domestic law. African countries with continental European (principally French) legal heritage are likely to be 'monist' in their approach to international law. This means that treaty obligations should automatically form part of the domestic law.

This 'automatic effect' cannot, however, be assumed as it seems that African states which are ostensibly monist have been inconsistent in the way their constitutions have expressed the monist intention and in the extent to which the courts have recognised it (Viljoen 2007, pp 530-534). Instead of relying on a monist assumption

for the incorporation of human rights treaty obligations into domestic law, it is preferable to ask – for each state and each treaty to which the state is a party – whether the circumstances of the state’s entering the treaty, and the domestic circumstances of the state, indicate that the treaty is self-executing or whether it requires domestic implementation (Viljoen 2007).

It would be possible to research the domestic laws of many, and perhaps most, African countries to identify domestic law (common law [dualist] countries) or domestic circumstances (European law [monist] countries). However, this would be a significant research task and, for the reasons outlined below, it would be of limited usefulness.

(b) *Difficulties in identifying treaty-based law*

There are a few reasons why it is difficult to identify African laws that give effect to human rights treaties. It would also be a slightly surreal exercise when some of the states under scrutiny are, or have recently been, in a state of civil war (eg Rwanda and Sudan), are living under a notoriously oppressive regime (eg Zimbabwe) or are without an established central government (eg Somalia).

Firstly, the law is difficult to locate for reasons of distance and inaccessibility, as well as inadequacy and unreliability of records; ‘in many smaller jurisdictions the statute book is becoming obscure – many of the laws are out of date, very hard to find, out of print, often un-indexed and overlain with new and conflicting provisions’ (Adsett, 2008).

Secondly, in some countries treaty obligations may already form part of the common law and so will not be found in legislation, making it harder to identify.

Thirdly, it is often not clear, without further research into parliamentary and executive documents, whether a law is intended to implement treaty obligations and whether treaty obligations have been – as is often the case – implemented across different pieces of legislation.

Viljoen notes (2007, p 537; emphasis original) the difficulty of being able “to determine conclusively which laws [in African states] have been enacted or amended as a result of (and consequent to) the adoption of an international instrument.” He notes as well that to search the various parliamentary and executive documents for clues is “difficult to undertake on a continent-wide scale [and] often such material does not exist in domestic African systems.”

Viljoen suggests (2007, p 537) that, because it has been so extensively ratified, the *Convention on the Rights of the Child* (CRC) “provides an appropriate instrument to gauge the ‘impact’ of international law upon domestic legal regimes”, noting that the CRC is referred to in the Preamble to the Senegalese Constitution, is reflected in the Constitutions of Cape Verde, Ethiopia, Malawi, South Africa and Uganda and is implemented to a degree in the laws of Ghana, Kenya, Namibia, Nigeria, Lesotho, South Africa and Uganda. However, precisely because the CRC is such a widely ratified treaty, a state’s implementation of it is not a sound gauge for the impact more generally of international law on domestic law and no assumption should be made about a state’s treaty implementation generally on the basis of its implementation of the CRC.

(c) *Giving 'effect' to human rights through laws*

Even if the existence of domestic laws implementing human rights could be established, assessing how human rights treaties have been 'given effect' requires going beyond mere legislative enactment. It means asking whether and how the laws have been given practical effect. Even if there is a law, is there a mechanism to police or enforce the law? Is it actually 'in effect' for the people of that country? Important questions to be asked of any law, particularly a human rights law, are whether people are aware of it and whether it operates in a way that people can use it and can receive its benefit. To determine this is a very substantial research exercise and one that is difficult to undertake without co-operation from a person or agency in the particular country.

As a measure of the effect of human rights on domestic law, Viljoen (2007, p 540) considers the extent to which African courts have 'applied' international human rights law, through both direct enforcement and interpretive guidance. His is "not a comprehensive survey ... as the exposition [by the courts] is sometimes very brief and the relevant sources are generally quite inaccessible." A summary of Viljoen's report on 14 countries – Benin, Botswana, Congo, Ghana, Lesotho, Malawi, Namibia, Nigeria, Senegal, South Africa, Tanzania, Uganda, Zambia Zimbabwe – is at Appendix C.

Viljoen notes (2007, p 566) that "local courts primarily interpret and apply national law", which may result in the application of human rights standards depending on their status in domestic law. But "due to their vague and open-ended character" international human rights standards may be interpreted differently by different judges, and reference to human rights standards is "closely linked to arguments forwarded by legal counsel".

It would be possible, if slow and uncertain, to build on Viljoen's work and investigate the African human rights situation in relation to additional or particular countries. At best it may be possible to infer – if reliable knowledge of the operation of human rights laws in an African country were available – what environment or ethos or awareness or experience of human rights a refugee or migrant from that country to Australia has when they arrive, but the inference would be very tentative.

Viljoen's conclusion (2007, 565) is that:

International human rights law does not form an effective part of domestic law in Africa. It is rarely used on its own as the source of an enforceable right. Courts much more frequently invoke international human rights standards as interpretative guides, along side constitutional provisions, to underscore or support a particular interpretation.

(d) *States' periodic reports*

A means of assessing the extent to which human rights are recognised could be to look at the concluding observations made by UN treaty committees and the African Commission on periodic reports that states make to them regarding their performance under the relevant treaties.

For the African Commission, the state reporting process actually provides no insights: “Reporting has been very tardy, and 18 of the 53 state parties to the African Charter have never submitted any report [as at 2006]. In 2001 the Commission started to issue concluding observations in respect of reports considered” (Steiner, Alston and Goodman 2006, p 1069; quoting Isa and de Feyter). Ouguergouz’s observation that “neither the state reports nor the concluding observations are published by the Commission” (2003, p530) is no longer the case, as these reports are now online at: www.achpr.org/english/_info/news_en.html.

It continues to be the case, however, that the Commission’s review of states’ periodic reports “has not actually been a great success to date, essentially because the states parties have seldom demonstrated the requisite diligence and rigour” (Ouguergouz 2003, p 530). The reports that have been submitted share the same characteristics as all states reports (not only those from Africa) in the UN system: they are “far too descriptive and do not devote enough space to the concrete steps taken to give effect to [human rights] ... most of the reports are essentially a reproduction *in extensor* of the rights guaranteed by constitutions of the states concerned” (Ouguergouz 2003, p 533).

A significant qualification to the usefulness of the UN committees’ concluding observations in assessing states’ human rights compliance is that the committees address only the matters that are brought to their attention. If the reporting state does not volunteer a matter in its reports or in answer to the committee’s questions, it is only through the report of a non-governmental organisation (NGO) that it would be known to the Committee. A state rarely volunteers matters that do not reflect well on it and NGO reports are not always made and do not purport to be comprehensive. In short, the UN committees’ observations tell us only what has been told to the committees and are far from exhaustive.

One example of the inadequacy of the periodic reporting process as a tool to assess domestic human rights practice is a report to the UN prepared by the Democratic Republic of Congo (DRC). In 2005 the DRC submitted its third report under the *International Covenant on Civil and Political Rights* (ICCPR) to the UN’s Human Rights Committee, which had been due in 1991. The Committee commented that the report “contains only partial information on the implementation of the Covenant in daily life and on the factors and difficulties encountered, focussing rather on the listing of relevant existing legislation or pending draft laws” (UN 2006, p 40). A similar criticism can be made of the DRC’s most recent report to the African Commission on its implementation of the African Charter (Eighth, Ninth And Tenth Periodic Reports from 2003 to 2007), the substance of which can be compared to the Human Rights Watch report on the DRC for 2008 (Human Rights Watch 2009b).

In answer to questions from the UN Human Rights Committee, the DRC delegation “frankly acknowledge[d]the poor conditions of detention in the country’s prisons, including the unacceptable state of sanitation and nutrition and the widespread overcrowding in these institutions” (UN 2006, p 44). Presumably relying on NGO reports, the UN Human Rights Committee recorded its concern about a number of matters (UN 2006, pp 41-46), including:

- the impunity with which many serious human rights violations have been and continue to be committed even though the identity of the perpetrators of these violations is often known

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- the persistent practice of discrimination against women with regard to education, equal rights of both spouses within marriage and the management of family assets
- reports of domestic violence and of failures by the authorities to ensure the prosecution of the perpetrators and care of the victims
- the very high maternal and infant mortality rates
- the large number of forced disappearances or summary and/or arbitrary executions committed throughout the State party's territory by armed groups
- the reliable reports of many acts of torture allegedly committed by, in particular, officers of the judicial police, members of the security services and armed forces, and rebel groups operating in the national territory
- the many death sentences handed down, especially by the former Military Court, against an indeterminate number of persons, and the suspension in 2002 of the moratorium on executions
- the trafficking of children, especially for the purposes of sexual or economic exploitation, and the forced recruitment of many children into armed militias and, although to a lesser extent, into the regular army
- pre-trial detention as the rule rather than the exception despite the Constitution and Code of Criminal Procedure
- the continued existence of military courts and at the absence of guarantees of a fair trial in proceedings before these courts
- that many journalists have been prosecuted for defamation or have been subjected to pressure, intimidation or acts of aggression, including imprisonment or harsh treatment, on the part of government authorities
- that many human rights defenders cannot freely carry out their work because they are subjected to harassment or intimidation, prohibition of their demonstrations or even arrest or arbitrary detention by the security
- the fate of thousands of street children whose parents have died as a result of either the armed conflict or AIDS
- the very limited effectiveness of civil status registries and at their complete absence in some localities
- the marginalization, discrimination and at times persecution of some of the country's minorities.

Periodic reports that have been submitted to UN committees by all states, and the related concluding observations of the various UN committees, are publicly available (UNHCHR 2009).

(e) *External reports*

NGOs report regularly on human rights compliance in different countries, as does the United States' Department of State.

Many of the observations made by the UN Human Rights Committee in 2006 concerning human rights compliance in the DRC (noted above) are consistent with matters later reported by Amnesty (2008), Human Rights Watch (2009a) and the US Department of State (2008), and it is likely that the UN Human Rights Committee's observations were informed by reports such as these.

Reports from these three principal human rights monitoring organisations are available for all 54 African countries (Amnesty 2009; Human Rights Watch 2009b; US Department of State 2009).

(f) *Individual communications*

The AU Charter provides two mechanisms for complaints (communications) to the African Commission about human rights violations, modeled very closely on the UN mechanisms. The first, established in articles 48 and 49, allows a state party to the AU Charter to submit a communications concerning another state party. The second, established in article 55, allows individuals subject to human rights violations, or organisations advocating on their behalf, to submit a communication to the Commission.

The procedures for dealing with these 'other communications', including rules of admissibility, are set out in the African Commission Rules of Procedure and article 56 of the Charter. Much like the UN communication procedures, a complainant must first exhaust local remedies and a state party against whom a communication is made must respond within six months. The individual communications mechanism is used frequently in the AU:

Individuals and NGOs based in or outside Africa are entitled to submit complaints to the African Commission and, over the years, many have done so. Complaints tend to increase against a state party depending on the political situation in the country. For example, during the era of military rule in Nigeria, it monopolised the communication procedure; more recently it was Zimbabwe that took the lead. (Bösl and Diescho, p 259)

One reason for the use of this procedure is because "the Charter is one of the most comprehensive instruments as far as catering for all categories of human and collective rights is concerned" (Bösl and Diescho, p 259). Despite its widespread use, the procedure does have some limitations. For instance, states parties often claim they have not received information about a complaint being lodged against them. (Bösl and Diescho, p 261)

2.3 Summary of human rights in law in Africa

No useful inferences can be drawn from an overview of treaty ratification alone. For example, while the *Convention on the Elimination of All Forms of Discrimination*

Against Women (CEDAW) has not been ratified by some countries with large Islamic populations (eg Chad), the treaty and its communication (complaint) protocol have been ratified by others (eg Guinea). There is no objectively discernible pattern, according to size, stability, development or other factors, that explains which countries have ratified certain treaties and which have not.

Based on the limited extent to which human rights law is an effective part of domestic law in Africa, and the poor status of the African Commission in Africa, it seems likely that refugees and migrants from Africa to Australia arrive with little knowledge or conscious experience of the guarantee, promotion and protection by the state of their human rights. As a general proposition, this view is likely to be supported by close study of states' periodic reports and of NGO reports on each country.

But people's knowledge and experiences of human rights will be very subjective across a continent as diverse as Africa. The use of the AU Charter communications mechanism, for example, does not indicate a broad and evenly spread awareness of the process and perhaps, reflects more accurately where NGOs are active in response to local human rights crises. An exception is probably South Africa, where a strong constitutional commitment to human rights protection exists within a relatively stable democracy and legal institutions of integrity.

It would require a detailed inquiry into domestic laws, practices, policies and politics to begin to develop a fair picture of the local human rights situation for any one country. Even then, a person's particular experience will be determined in large part by their own social and cultural contexts in the particular society.

2.4 African ratification of the Refugee Convention

(a) UN and AU Conventions

The African states that have ratified the UN Convention Relating to the Status of Refugees (the Refugee Convention) are set out in Appendix A. It is also relevant to know the African states which have ratified the *African Union Convention Governing the Specific Aspects of Refugee Problems in Africa* (AU Refugee Convention): see Appendix B.

The UN Refugee Convention is commonly not included in a list of human rights treaties because its purpose is not primarily to accord rights to refugees but, rather, to manage "the inter-state ramifications of refugee movements" (Viljoen 2007, p 257). It has, however, an indirect effect on human rights because it imposes protection obligations on states and, Viljoen would class it as "a 'human rights-related' treaty". As well, "[i]t is no longer possible to interpret to apply the Refugee Convention without drawing on the text and jurisprudence of other human rights treaties. Conversely it is not possible to monitor the implementation of other human rights treaties, where refugees are concerned, without drawing on the text of the Refugee Convention and the related interpretive conclusions of the UNHCR Executive Committee" (Murray 2004, p 185; quoting Clark and Crepeau).

The AU Refugee Convention "on the whole, mirrors the exact wording of the UN Convention, but expands the definition of 'refugee'" (Viljoen 2007, p 255). The definition is broader and takes account of a wider range of considerations, beyond

the individual's circumstances to their social and economic environment. As well, the AU Refugee Convention explicitly requires states to grant asylum and prevents states punishing returning nationals who had been accepted elsewhere as refugees (Viljoen 2007, pp 255-256). Viljoen describes the AU Convention as an "impressive normative framework", but lacking the support of domestic legislation to give effect to it (Viljoen 2007, p 258). Commenting on the AU Refugee Convention, Murray quotes Okoth-Obbo (Murray 2004, p 190): "It is striking to note the limited extent to which the OAU Convention has actually and concretely provided the anchor for refugee dialogue and action in Africa."

The AU Refugee Convention does, however, have a closer connection with human rights than does the UN Convention since the African Commission on Human and Peoples' Rights took on the responsibility of overseeing compliance with the AU Refugee Convention and the African Commission began co-operating with the United Nations High Commissioner for Refugees (UNHCR) (Murray 2004, p 194; Viljoen 2007, p 258).

It is important to recall that, while the UN Refugee Convention and, to a lesser degree, the AU Refugee Convention are not explicitly concerned with rights protection, refugees and asylum seekers are as entitled as citizens to human rights protection from (and against) a state under UN human rights treaties and the African Charter.

(b) Statistics on refugees

The situation regarding refugees in Africa is very complex and difficult to report succinctly. The UNHCR separates 'North Africa' from 'Africa' and includes statistics for North Africa with those for the 'Middle East'.

A general trend at the end of 2008 was that there were decreasing numbers of refugees in the region. For example, at the end of 2008 there were 2.1 million refugees in sub-Saharan Africa, the lowest population since 1977 (UNHCR 2009, p 26).

In its 2008 statistical report the UNHCR reported (2009, pp 25 -27) that:

By the end of 2008... [t]he Middle East and North Africa region was host to about one fifth (22%) of all refugees (primarily from Iraq) while Africa (excluding North Africa) and Europe hosted respectively 20 and 15 per cent of the world's refugees....

In Africa (excluding North Africa), the number of refugees continued to decline for the eighth consecutive year. By the end of 2008, there were 2.1 million refugees compared to more than 3.4 million in 2000. The refugee population decreased by 7 per cent between the start and end of 2008, primarily due to successful voluntary repatriation operations to Burundi (95,400), South Sudan (90,100), the Democratic Republic of the Congo (54,000) and Angola (13,100). Unfortunately, renewed armed conflict and human rights violations in the Central African Republic, the Democratic Republic of the Congo, Somalia and Sudan also led to refugee outflows of almost 210,000 people, primarily to Kenya (65,000

new arrivals), Uganda (49,500), Cameroon (25,700), and Chad (17,900)...

Chad was the sixth largest hosting country [in the world] at the end of 2008 with more than 330,000 refugees. The figure increased by 35,000 during the year (+12%), mainly as a result of new arrivals from the Central African Republic and Sudan. In the United Republic of Tanzania, the refugee population dropped to 322,000 (-26%) due to the voluntary repatriation of 95,000 Burundian and 15,600 Congolese refugees. Figures in the United Republic of Tanzania have more than halved since 2002 when the country was host to close to 700,000 refugees. On the other hand, Kenya witnessed an increase during 2008 with the arrival of 65,000 Somali refugees. The country's refugee population stood at more than 320,000 by the end of the year (+21%).

The UNHCR summarised the position in the following table.

(c) *Table 1. Refugee population by UNHCR regions, 2008 (UNHCR 2009, p 25)*

UNHCR regions	Start-2008			End-2008			Change (total)	
	Refugees	People in refugee-like situations	Total refugees	Refugees	People in refugee-like situations	Total refugees	Absolute	%
Central Africa and Great Lakes	1,086,200	15,000	1,101,200	978,200	27,800	1,006,000	-95,200	-8.6
East and Horn of Africa	815,200		815,200	763,900		763,900	-51,300	-6.3
Southern Africa	181,000		181,000	161,100		161,100	-19,900	-11.0
West Africa	174,700		174,700	175,300		175,300	600	0.3
Total Africa (excluding North Africa)	2,257,100	15,000	2,272,100	2,078,500	27,800	2,106,300	-165,800	-7.3
Middle East and North Africa	2,654,000	67,600	2,721,600	2,278,200	72,800	2,351,000	-370,600	-13.6

Considerably more detailed statistics are available for each African state (UNHCR 2009). The statistics profile, for example:

- refugees, asylum-seekers, internally displaced persons, returnees, stateless persons, and others of concern to UNHCR by country of asylum and by origin
- refugee population, excluding asylum-seekers and people in refugee-like situations, and changes by country of asylum
- refugee population, excluding asylum-seekers and people in refugee-like situations, and changes by origin.

Viljoen (2007, p 257) relies on similar UNHCR statistics for 2006 to say that “five of the countries from which most refugees emanate are in Africa”: Sudan 693,300; Burundi 438,700; DRC 430,700; Somalia 394,800; Liberia 231,100.

(d) *Treatment of refugees*

The following overall account relies principally on the account given by Murray (2004, ch 7). Reports from the UNHCR and NGOs provide more detailed accounts of the situation in particular states.

Murray discusses the situation of refugees in Africa generally, describing AU mechanisms, summarising trends in the AU’s approach, considering rights accorded to refugees, returnees and internally displaced persons (IDPs) and identifying sites of responsibility. On this last point Murray says (2004, p227) “[o]ne of the main reasons why the approach to refugees and their rights has been incoherent in the OAU/AU could relate to the lack of clarity as to whose responsibility they are.” Responsibility has been ‘fudged’ among the various states and has fallen, effectively, to the UNHCR, which has in turn been criticised for the inadequacy of its response to the persistent refugee crises across Africa.

Murray describes shifts in refugee policy in Africa during the 1990s, not all of which are consistent with each other: from concern for the plight of individuals to concern for the security of the state; from attributing the cause of displacement to colonisation to attributing it to state conduct; from long-term solutions to temporary measures; from a humanitarian approach to a human rights framework; from permanent resettlement to voluntary repatriation; from funding for development to funding for relief. She also describes an increase in the number of IDPs relative to refugees.

Viljoen (2007, p 259) gives an example of the phenomenon of concern for the security of the state at the expense of concern for the plight of individuals: “Due to civil war in its two neighbours, Liberia and Sierra Leone, Guinea has become the largest host to refugees on the continent. In September 2000, ‘rebel’ groups launched surprise attacks against Guinea from Liberia and Sierra Leone. Invoking the constitutional obligation to guarantee Guinea’s territorial integrity, the President of Guinea ordered that refugees be ‘quartered’ in ‘secured areas’”. The Sierra Leonean refugees were then subjected to human rights violations, which the AU Commission found was in breach of Guinea’s obligations to respect the human rights of refugees and to apply the AU Refugee Convention without discrimination.

Viljoen (2007, p 258) recounts examples of serious violations of [the AU Refugee Convention that] have occurred and continue: “Nigeria expelled refugees (in conflict with the principle of *non-refoulement*) from Chad, Kenya and Zimbabwe neglected their duty to protect Somali and Mozambican refugees respectively and Senegal refused to recognise Mauritanian expellees as refugees.” Relying on UNHCR figures, he states (2007, p 260) that “[t]he numbers, as well as the situation, of IDPs, especially in the Sudan, Somalia and Liberia, remain grave.”

(e) *Summary of refugee protection in Africa*

No useful inferences about the experience of African refugees and migrants can be drawn only from an account of states' ratification of the UN and AU Refugee Conventions.

Looking at the situation more broadly, Murray (2004, p 227) describes the approach to dealing with refugees in Africa as "incoherent". The fractured nature of UN and AU refugee oversight and protection, the 'buck passing' among states and the tendency of states to defend their sovereignty before meeting individual need are, taken together, probably a sufficient basis for assuming that refugees and migrants from Africa to Australia arrive with little knowledge of relevant protections set out in international law and little experience of having received respectful or rights-based treatment as refugees.

3 The human rights environment African refugees are coming to

3.1 Human rights treaties Australia has ratified

Australia has ratified the UN Refugee Convention and most of the UN human rights treaties and related protocols, as well as those of the International Labor Organisation (ILO): see [Appendix D](#).

More important questions are whether, and to what extent, Australia has legislated to give effect to these treaty obligations: see B3 below.

3.2 Human rights treaties that Australia has not ratified

(a) *Migrant Workers Convention*

Australia has not ratified the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (MWC).

In federal Parliament on 14 February 2007, the then Minister for Foreign Affairs, Alexander Downer, answered a question in writing from Mr Daryl Melham who asked: "On what occasions, in what circumstances and with what results has Australia consulted with other States about becoming a party to the Convention?" Mr Downer said (Hansard 2007, p 246) only that "Australia has not formally consulted with other States on becoming a party to the convention."

There is some indication as to Australia's concerns about the MWC in an observation made by the then Department of Immigration and Multicultural Affairs in its submission to an inquiry into Australia's relationship with India as an emerging world power: "India, like Australia, does not support the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *which does not distinguish between legal and illegal migrants in some provisions*"

(emphasis added) (Joint Standing Committee on Foreign Affairs, Defence and Trade, 2006, p 12).

Piper observes that for countries likely to 'receive', rather than 'send', migrant workers (such as Australia) the obstacles to ratification are political, stemming from a poor understanding of the Convention and its implications (Piper 2006, part 4.1). Piper does not identify Australia as a prospective 'receiving' country (but does identify New Zealand as one) and this suggests that a further reason for Australia's non-ratification is that Australia has not seen ratification as important or necessary. Australia has not been a significant recipient of migrant workers (ie workers who have not migrated with residency status and prospective access to citizenship), however, that situation has changed to some extent in recent years with a growing number of '457 visa workers' and, most recently, with the commencement of the Pacific guest worker scheme.

(b) *Optional Protocol to the Convention against Torture*

Australia has signed, but not ratified, the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). Ratifying it would mean that Australia would have to allow the UN Subcommittee on Prevention of Torture "to visit any place of detention and must ensure free and unfettered access", and to "establish a National Preventive Mechanism (or NPM)" (Harding and Morgan 2008, [2.7]).

The Australian Parliament's Joint Standing Committee on Treaties (JSCOT) inquired and reported in 2004, saying (JSCOT 2004, v) "there is no suggestion that the independent national preventative mechanisms are inadequate in Australia. Commonwealth, State and Territory Governments all conduct education and training programs and have mechanisms to prevent torture." The Committee recommended (Recommendation 1) *against* ratifying the Optional Protocol "at this time".

The current Labor Government has said it will ratify the OPCAT (Harding and Morgan 2008, [2.1]), and in 2008 the Australian Human Rights Commission engaged Professors Richard Harding and Neil Morgan to report on how it might be implemented.

(c) *International Labour Organisation (ILO) conventions*

Australia has not ratified the *ILO 138 Minimum Age Convention*. A reason for this, given in a research note from the library of the Australian Parliament (Luttrell, 1996), is that the Convention addresses child labour concerns that do not arise in Australia and that its terms would in fact limit employment opportunities for young people in jobs where their interests are already protected by legislation:

One point that has emerged clearly from international discussions, is the need to differentiate between employment of children and their exploitation. In many countries, family-run farms or small-scale manufacturing businesses need the assistance of their children and often do not place severe burdens on them. Attempts at blanket elimination of child labour could bring unnecessary hardship and would, in any case, be unrealistic. Even where undesirable conditions do exist, policies must be carefully thought through so that the

children are not further disadvantaged. For example, Australia is unlikely to ratify the *ILO 138 Minimum Age Convention* which does not allow for children under 15 being permitted to work on a paper round or in a fast food outlet in their spare time or school holidays. These activities are common in Australia and are controlled by legislation.

3.3 How Australia is meeting its treaty obligations

As to whether and to what extent Australia has legislated to give effect to its treaty obligations, see [Appendix D](#).

Independent assessment of the adequacy of Australia's performance under its human rights treaty obligations in the Concluding Observations of the UN treaty bodies in response to periodic reports submitted by Australia. The observations of the treaty bodies are also informed by informal or 'shadow' reports submitted by NGOs and the Australian Human Rights Commission.

As noted above in relation to Africa, a significant qualification to the usefulness of these observations as a measure of a state's human rights compliance is that the committees address only the matters that are brought to their attention. If the reporting state – eg Australia – does not volunteer a matter, it is only through reports of an NGO or a national human rights institution (such the Australian Human Rights Commission) that it would be known to the Committee. States rarely volunteer a matter that does not reflect well on it. The reports submitted by states to treaty bodies are usually descriptive, promotional and uncritical; Australia's are no exception. Reports by NGOs are not always submitted and they do not purport to be comprehensive. So the UN Committees' observations tell us only what has been told to the committees, and are far from exhaustive. There is, however, no other single source of accountability for Australia's human rights conduct.

In its concluding observations on the fifth periodic report of Australia under the ICCPR, the UN Human Rights Committee (UN 2009) noted and welcomed positive aspects of Australia's performance, including: the National Human Rights Consultation regarding the legal recognition and protection of human rights in Australia; the federal Parliamentary apology to indigenous peoples who were victims of the 'Stolen Generations' policies; and the establishment of the National Council to Reduce Violence against Women and their Children.

As well, the Committee noted principal subjects of concern such as:

- the lack of legislative protection of human rights at the national level
- the incompatibility of Australian counter-terrorism legislation, policy and practice with basic human rights
- the rights to equality and non-discrimination not being comprehensively protected in Australia
- the need to take further steps to address ongoing issues of violence against women and homelessness
- the need to take "urgent and adequate measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they

are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment”

- the continued trafficking in human beings, especially women, which persists in Australia
- the excessive use of force by police against racial minorities, including the use of Taser guns and lethal force
- the continued policy of mandatory immigration detention and the use of Christmas Island as a remote detention facility
- the increased number of cases of discrimination of persons of Muslim background, and
- the importance of establishing a comprehensive national human rights education program.

Similarly, in its concluding observations on the thirteenth and fourteenth periodic reports of Australia under the *Convention for the Elimination of Racial Discrimination* (CERD), the Committee on the Elimination of Racial Discrimination (UN 2005) noted and welcomed positive aspects of Australia’s performance, including: the criminalising of serious acts of racial hatred or incitement to racial hatred in most Australian states and territories; the significant progress achieved in the enjoyment of economic, social and cultural rights by the indigenous peoples; the diversionary and preventative programmes aimed at reducing the number of indigenous juveniles entering the criminal justice system; the abrogation of mandatory sentencing provisions in the Northern Territory; and the numerous human rights education programmes developed by what is now the Australian Human Rights Commission.

At the same time the Committee noted principal subjects of concern, including:

- the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth
- the abolition of the Aboriginal and Torres Strait Islander Commission
- Australia’s continuing reservation to article 4 (a) of CERD
- that while the Commonwealth, the State of Tasmania and the Northern Territory make acts of racial hatred or incitement to racial hatred unlawful (as do all Australian jurisdictions), they do not criminalise serious instances of such conduct
- prejudice against Arabs and Muslims in Australia has increased
- the enforcement of counter-terrorism legislation may have an indirect discriminatory effect against Arab and Muslim Australians
- reports of biased treatment of asylum-seekers by the media
- the difficulty for complainants, under the *Racial Discrimination Act*, in establishing racial discrimination
- that no cases of racial discrimination, as distinct from racial hatred, have been successfully litigated in the Federal courts since 2001
- the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the *Native Title Act* with the Convention

- the high standard of proof required to establish elements in the statutory definition of native title under the *Native Title Act*
- the wide gap that still exists between the indigenous peoples and others, in particular in the areas of employment, housing, health, education and income
- provisions for mandatory sentencing in the *Criminal Code* of Western Australia
- the striking overrepresentation of indigenous peoples in prisons as well as the percentage of indigenous deaths in custody
- reports of alleged discrimination in the granting of visas against persons from Asian countries and Muslims, noting the assurances given by the Australian delegation that no such discrimination occurs
- the mandatory detention of illegal migrants, including asylum-seekers, in particular when such detention affects women, children, unaccompanied minors and those who are considered stateless, in many cases for over three years.

Comments of this nature have also been made by the Committee against Torture (UN 2008), the Committee on the Elimination of Discrimination against Women (UN 2006a), Committee on The Rights of the Child (UN 2005a) and the Committee on Economic, Social and Cultural Rights (UN 2000).

The overall impression created by these observations is that Australia does well, but could do better. There are glaring inadequacies in protection and promotion of the economic, social and cultural rights of Australia's Indigenous peoples in particular, to the extent perhaps of systemic failure. There are gaps and lapses in protecting the rights of migrant communities and asylum seekers. These gaps are, to some extent, the legacy of a federated legal system where states and territories approach matters such as vilification legislation differently.

As noted above in relation to Africa, important questions are whether people are aware of the available legal protections and whether the domestic law actually operates so that people can use it and receive its benefit. Appendix D sets out the human rights treaties to which Australia is a party, and whether there is a domestic remedy in Australia for violations of the rights under those treaties. The remedies available are provided by a legal system that is – if not absolutely, then at least when compared to the situation generally in Africa – independent, reliable, uncorrupted and unbiased. The availability of remedies from the Australian legal system is, however, compromised by the system's inaccessibility for reasons of language, technicality and expense, which are discussed below. The human rights laws in Australia are described, before considering the availability of remedies.

3.4 *Refugee laws in Australia*

As a State party to the UN *Refugee Convention*, Australia has recognised the right of refugees to seek asylum in Australia and to extend protection to them. The obligations of the *Refugee Convention* are reflected (but not exactly) in the *Migration Act 1958* (Cth) and its associated Regulations, and the *Australia Citizenship Act 1948* (Cth).

Under the Refugee Convention an asylum seeker must show that they have a “well-founded fear of persecution”. The word ‘persecution’ is defined in the Migration Act and sets a higher threshold than the Refugee Convention. It allows adverse inferences to be drawn from the fact that a claimant for refugee status has no documentation; the feared persecution must be “systematic and discriminatory conduct” that involves “serious harm to the person”; and to be a “well-founded” fear, “the essential or significant reason” for the fear must be one of the reasons outlined in the Refugee Convention: (race, religion, nationality, membership of a particular social group, and political opinion).

A further difference between the Refugee Convention and the Migration Act is that an assessment of refugee status will “disregard any conduct engaged in by the person in Australia unless ... the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person’s claim to be a refugee.” So, for example, a religious conversion to Christianity in Australia might not be taken into account as a basis for claiming refugee status. This is contrary to a UNHCR recommendation that refugee claimants be given the “benefit of the doubt” in determining a request for asylum (Crock and Saul 2002, p 66).

The approach of the Australian High Court has been more in keeping with the beneficial intent of the Refugee Convention. Rejecting a suggestion that a person’s fear of persecution should be discounted if they could have taken steps to avoid it, the Court has said that such a view is “wrong in principle” and that “measures in disregard of human dignity may, in appropriate cases, constitute persecution”.¹

Of the Refugee Convention grounds for fear of persecution, ‘membership of a particular social group’ may be particularly relevant to African asylum seekers. The courts have said that:

There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is ‘for reasons of’ his membership of that group.²

The High Court has said that

It is power, not number, that creates the conditions in which persecution may occur. In some circumstances, the large size of a group might make implausible a suggestion that such a group is a target of persecution, and might suggest that a narrower definition is necessary. But I see nothing inherently implausible in the suggestion that women in a particular country may constitute a persecuted group ... cohesiveness may assist to define a group; but it is not an essential attribute of a group. Some particular social groups are notoriously lacking in cohesiveness.³

¹ *S395 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; 216 (2003) CLR 473.

² *Ram v Minister for Immigration* (1995) 57 FCR 565, 569.

³ *Minister for Immigration v Khawar* [2002] HCA 14; 210 CLR 1.

(a) Refugee and Special Humanitarian Program

The Australian Government's Refugee and Special Humanitarian Program was to accept 13,750 people in the 2009-10 year (Department of Immigration and Citizenship 2010) In the 2008-09 program the top ten countries of origin of offshore Refugee and Special Humanitarian program entrants were Iraq (2,874), Burma (2,412), Afghanistan (847), Sudan (631), Bhutan (616), Ethiopia (478), Democratic Republic of Congo (463), Somalia (456), Liberia (387) and Sierra Leone (363) (Refugee Council 2010, p 15)

Refugees and humanitarian applications are made overseas (offshore), in Australia (onshore) and from Christmas Island.

(b) Offshore (overseas) refugee applications

The offshore component of the Refugee and Special Humanitarian Program consists of two main visa categories:

1. The Refugee Program category– this is available to applicants who are subject to persecution in their home country and are in need of resettlement as refugees. These people are referred, usually by the UNHCR, to Australia's Refugee Program (Refugee Council 2010, p 13).
2. The Special Humanitarian Program category - this is available to people who are outside their home country and who would be subject to persecution, gross human rights violations and/or discrimination if they were to return to their home country (Refugee Council 2010, p 13).

People accepted under the Refugee Program category may be eligible for the following visas from Australia:

- Refugee visa (subclass 200), if they are referred from UNHCR and meet health and character requirements
- In-country Special Humanitarian visa (subclass 201), if they are unable to leave their own country
- Emergency Rescue visa (subclass 203, which is rarely used), if they face an immediate threat and are referred from UNHCR
- Woman at Risk visa (subclass 204), if they are especially vulnerable women and children (Refugee Council 2010, pp 13-14).

People accepted under the Special Humanitarian Program may be eligible for the Special Humanitarian visa (subclass 202), provided they are supported by a proposer who is an Australian citizen, permanent resident or a community organisation based in Australia; applicants must meet health and character tests (Refugee Council 2010, pp 13-14).

(c) Onshore (in Australia) refugee applications

An asylum seeker who arrives in Australia lawfully (eg on a visa such as a tourist visa, family visitor visa or skilled workers temporary (457) visa) and applies for refugee status when in Australia will receive a bridging visa. Depending on how long they have been in Australia, the visa may give them permission to work and to

access to Medicare entitlements (Refugee Council 2009). An asylum seeker who is in Australia unlawfully (ie arrives without a visa or has their visa cancelled in Australia) and is *not* in an excised territory will be detained throughout the refugee status determination process.

An application for refugee status is assessed by the Department of Immigration and Citizenship (DIAC). Applications can be made by individuals and family groups; if one member of the family is determined to be a refugee, the whole family is granted refugee status. In response to a large influx of refugee applicants in early 2010, the Australian Government announced that they will suspend the processing of visa applications of asylum seekers arriving from Sri Lanka (three months) and Afghanistan (six months).

If the application for refugee status is accepted then the person or family will be granted a permanent protection visa. If the application is rejected it can be reviewed by the Refugee Review Tribunal (RRT) in what is called a 'merits review', which can confirm the rejection or overturn it and grant refugee status. Approximately 10% of review applications result in a grant of refugee status (Refugee Council 2009a).

If, as is usual, the RRT confirms the rejection, DIAC can refer the application to the Minister for Immigration if there are humanitarian reasons why an asylum seeker should not be returned to their country of origin. An asylum seeker can also make a direct approach to the Minister (Refugee Council, 2009a). As well, the RRT's decision can be appealed to the Federal Court on narrow technical grounds (judicial review); a successful result would mean that the application would be reconsidered by the RRT.

(d) Excised territories

The Migration Act designates some external territories of Ashmore, Cartier, Christmas and Cocos (Keeling) Islands as "excised offshore places". People who arrive in an excised offshore place are returned to the country they last came from – usually Indonesia – or are relocated to a detention centre.

The 'Pacific Solution' which operated under the Coalition Government until 2007 is no longer in operation. People who arrive in an excised offshore place are no longer detained in Nauru or Papua New Guinea. They are detained instead on Christmas Island and, since Christmas Island reached capacity in early 2010, on the Australian mainland

People who arrive in an excised offshore place cannot apply for asylum (ie for a protection visa) unless the Minister decides that it is in the public interest to do so. In practice, it appears (there are no rules) that the Minister decides whether people who are detained are likely to be assessed as refugees and, if so, allows them to apply under the Migration Act.

The excision of external territories is a partial withdrawal by Australia from its obligations under the Refugee Convention. It is arguable that the detention of the asylum seekers is a restriction of refugees' right of freedom of movement, in breach of articles 26 and 31 of the Refugee Convention (O'Neill, Rice and Douglas 2004, p 715). Additionally, the suspension of refugee applications in 2010 for people from Sri

Lanka and Afghanistan is discriminatory and contravenes article 3 of the Refugee Convention.

3.5 Human rights laws in Australia

Australia's common law legal system is 'dualist', meaning that international treaties have no direct operation in Australia unless they are given effect by domestic legislation. There is an argument – not yet successful in a court – that international customary law (eg the offence of genocide) forms part of Australia's common law.⁴

Australia's federal Parliament has the constitutional power (s51(xxix)) to make domestic laws that give effect to international treaty obligations. Australian states and territories can choose to do so whenever they wish, subject only to consistency with similar federal laws. Many of the human rights set out in the international human rights treaties to which Australia is a party are given effect in different laws, such as industrial laws, discrimination laws and privacy laws. However, to assess whether, and to what extent, Australia's international human rights treaty obligations are being met in Australia, it is necessary to go through the laws of nine jurisdictions: federal laws, and those of six states and two self-governing territories.

(a) Constitutional rights

The Australian Constitution does not contain any explicit guarantees of human rights. It was drafted (in the late 19th century) not as a 'rights' document but as a framework for federal government, and its provisions were not intended to guarantee any of what we now understand to be fundamental human rights. The 'rights' in the Constitution are largely pragmatic, drafted to secure agreement from the states to join a federation.

The Constitution explicitly recognises

- a person's right (and the right of a company and a state) to compensation 'on just terms' for their property that is acquired by the Commonwealth Government (s51(xxxi))
- a person's right to trial by jury (s80), but only for serious cases (ie that proceed by indictment not summons) and only for Commonwealth offences; most criminal law in Australia is state and territory law
- a person's right to move freely across Australian state borders (s92)
- an obligation on the Commonwealth to not establish any religion as a national religion, to not require any religious observance, to not unreasonably restrict the practice of a religion and to not require a religious test for Commonwealth employment (s116)
- a person's right to not be discriminated against on the basis of state residency (s117)
- a person's right to cast a vote, if they have been granted a right to vote at all (s41).

⁴ *Nulyarimma v Thompson* [1999] FCA 1192 [186] per Merkel J

As well, the High Court has said that because the Constitution establishes a system of democratic and responsible government, it implicitly recognises a right to freedom of expression in relation to public and political affairs,⁵ at least to the extent that there is an obligation on the federal Parliament to not make laws that limit such communication.⁶

(b) *No national 'bill of rights'*

Although some laws give effect to certain rights, Australia has not passed federal laws that give effect to the ICCPR or the *International Covenant on Economic Social and Cultural Rights* (ICESCR). It is the only democracy in the world to not have a 'Bill of Rights' or any other national legislative guarantee of human rights.

Australia has explained this state of affairs to the UN by saying that "the high level of acceptance, protection and observance of human rights in Australia is founded upon a system of representative and responsible government, certain limited constitutional guarantees, statute law including specialized human rights legislation, the common law and an independent judiciary" (UN 1994, [174]).

Australia acknowledges that there is federal power to implement treaty obligations but says (UN 1994, [180]-[182]) that:

Exercise of this Federal power alone, however, would not be an adequate or efficient means for Australia to give effect to its international obligations. Much of the public infrastructure within Australia is at the State level. The States also administer significant elements of the Australian legal system. The States already, therefore, exercise responsibility in many matters of relevance to the implementation of human rights.

This excuse relies on a claim of 'efficiency', not on any legal obstacle, as a reason for Australia's failure to give legislative effect to human rights treaties such as ICCPR and ICESCR.

The UN Human Rights Committee (UN 2000a) has commented adversely on Australia's failure to guarantee the rights set out in the ICCPR saying:

The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy (art. 2).

⁵ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

⁶ *Lange v ABC* (1997) 189 CLR 520.

Similarly, the UN Committee on Economic, Social and Cultural Rights has recorded (UN, 2000a) that it “regrets that, because the Covenant has not been entrenched as law in the domestic legal order, its provisions cannot be invoked before a court of law”.

The UN CRC Committee too has expressed concern that rights under the CRC are not enforceable in Australian courts and that many Australian laws do not comply with the CRC; for example, minimum ages for employment and for criminal responsibility (UN 1997).

In 2009 the Commonwealth Government conducted a National Human Rights Consultation, to ask the Australian community (through community roundtables, public hearings and written submissions):

- which human rights (including corresponding responsibilities) should be protected and promoted?
- are these human rights currently sufficiently protected and promoted?
- how could Australia better protect and promote human rights?

The Consultation Committee report to the Australian Government highlighted that there was “no doubt that the protection and promotion of human rights is a matter of national importance” to the Australian community (National Human Rights Consultation Report, xiii). The report highlighted many community concerns with the current protection of human rights in Australia including:

- the lack of legal recourse for human rights violations, particularly for vulnerable groups such as migrants and asylum seekers
- the lack of knowledge in the community about human rights
- limited mechanisms to keep the Government accountable for the introduction of legislation inconsistent with Australia’s human rights obligations.

Some recommendations of the report to address these concerns included creating a framework for greater education on human rights (Recommendation 29), and legislating to create a federal human rights act (Recommendation 34).

In response to the report, the Government announced in 2010 that a new Human Rights Framework will be established (Australia’s Human Rights Framework, 2010) which will include:

- funding for greater human rights education
- establishing a new Parliamentary Joint Committee on Human Rights to provide scrutiny of legislation for compliance with international human rights obligations
- combining federal anti-discrimination laws into a single Act.

In announcing the Framework, the Australian Government explicitly rejected the recommendation to create a federal Human Rights Act or Charter, a decision that it will have to explain to the UN Human Rights Committee in its next periodic report.

Among the eight states and territories there are two laws that guarantee, to a very significant extent, the civil and political rights set out in the ICCPR, though not those

in ICESCR: the Australian Capital Territory's *Human Rights Act 2004* and Victoria's *Charter of Human Rights and Responsibilities 2006*. Recommendations for human rights legislation have been made and not acted on in Tasmania (Tasmania Law Reform Institute 2007) and Western Australia (Consultation Committee for a Proposed WA Human Rights Act 2007).

(c) *ACT Human Rights Act*

The *Human Rights Act 2004* (ACT) in the Australian Capital Territory (ACT) explicitly adopts most of the rights found in the ICCPR. The Consultative Committee established in 2002 to determine whether the ACT Government should pass a Human Rights Act, and what form such an Act should take, recommended in 2003 that economic, social and cultural rights be included in such an Act. The Committee argued that the perceived difficulties with implementing economic, social and cultural rights are over-stated. Nonetheless, the ACT Government chose not to enact those rights.

As the Explanatory Statement to the Human Rights Act sets out, the Act expresses rights "in the same terms as the Covenant except where 'some adjustments to language were necessary ... For example, the right to life is expressed to apply only to a person from the time of birth [and] ... In some instances a right has been omitted because it is not appropriate to the ACT as a territory under the authority of the Commonwealth.'" Although the terms in which some rights, such as freedom of "thought, conscience, religion and belief", are not expressed in the Act in precisely the same terms as the ICCPR, it has made no difference in practice and is unlikely to do so.

The Human Rights Act does not give an individual a right to a remedy for violation of a human right. Instead it enables the ACT Supreme Court to make a declaration of incompatibility in relation to an ACT law, without actually invalidating the law. In addition, it requires an ACT law to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the law's purpose.

(d) *Victorian Charter of Human Rights and Responsibilities*

Similarly to the ACT Human Rights Act, the *Charter of Human Rights and Responsibilities 2006* (Vic) explicitly gives effect to the rights in the ICCPR but not those in the ICESCR. In its Statement of Intent establishing the consultation process for a Charter, the Victorian Government expressed its preference against legislating for economic, social and cultural rights. In its report the consultative committee recommended against legislating for those rights immediately, suggesting they might come later.

The Victorian Charter sets out an adapted version of the rights in the ICCPR, limiting application of the right to life to the time after birth, limiting non-discrimination on the basis of 'other status' under article 26 of the ICCPR to "other status provided for under the *Equal Opportunity Act 1995* (Vic)" and excluding the right to self-determination. The Charter includes provisions that protect people from being unlawfully deprived of their property; protects the cultural, religious and language rights of minorities; and protects Indigenous cultural rights.

As is the case with the ACT *Human Rights Act*, the Charter does not give an individual a cause of action for remedy. It does, however, enable the Victorian Supreme Court to declare that a law is incompatible with the Charter and requires Victorian laws to be interpreted in a way that is compatible with human rights, as far as is possible consistently with a law's purpose.

(e) *The place of human rights treaties in Australian law*

The Australian Government has relied on federalism as a reason for not taking responsibility for legislating for federal human rights protection. Australia has said to the UN (UN 1994, [181]) that:

Provided the States can ensure that human rights obligations are given effect in the administration of those matters, the exercise of Federal power to achieve the same purpose would often give rise to unnecessary duplication of both infrastructure and expenditure. The Federal Government, in general, relies on States to give effect to international treaties where the particular obligation assumed affects an area of particular concern to the States and where it is also consistent with the national interest and the effective and timely discharge of Australia's treaty obligations.

In response, the UN Human Rights Committee (UN 2000a) said:

While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligation to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions (art. 50).

The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.

Although the ICCPR has not been legislated into federal Australian law, it is a schedule to the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA; formerly the *Human Rights and Equal Opportunity Commission Act 1986*). As well, CRC and the *Convention on the Rights of Persons with Disabilities* (CRPD) have been 'declared' under AHRCA. This means that a person may complain to the Australian Human Rights Commission when the Australian Government or one of its agencies breaches a person's rights under the ICCPR, CRC or CRPD. The Commission has the power to investigate and to make recommendations. This mechanism has been used by asylum seekers to complain about their mandatory detention.⁷

⁷ <www.hreoc.gov.au/legal/humanrightsreports/> at 2 May 2010.

None of the ICESCR, CERD or CAT is a schedule to or declared under the AHRCA so there is no mechanism for complaining to the Commission about breaches of rights set out in those treaties.

Many of the guarantees in ICESCR are reflected in the provision of public services in Australia, for example, health and education. However, these services are not made available as a *right*; services can be withdrawn at any time and there is no enforceable claim to the services being provided.

In 2010, the Australian Government enacted the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), which creates an offence for acts of torture carried out by a person residing in Australia, where those acts occurred either within or wholly outside Australia.

Despite these reforms, there remain gaps in Australia's fulfilment of its obligations under the CAT. The *Extradition Act 1988* (Cth) requires the Attorney-General to be satisfied that a person will not be subjected to torture if extradited, but not if the person is deported or removed otherwise. As a result of this limited approach, Australia is not bound by CAT when returning an unsuccessful asylum seeker to their own country ('refoulement'), where they fear torture.⁸ The CAT Committee has expressed concern about this situation in 2000 (UN 2000b) and again in 2008 (UN 2008), although in 2008 it was able to note the (new) Minister's intention to reconsider his high degree of discretionary authority.

In ratifying the CAT, Australia has agreed to the operation of a mechanism that enables a person to lodge a complaint (communication) with the UN CAT Committee about a violation in Australia of their rights under the CAT. However, a view expressed by the Committee in response to a complaint is non-binding.

As noted above, Australia intends ratifying the Optional Protocol to CAT, thereby allowing the UN Subcommittee on the Prevention of Torture to inspect any place of detention in Australia, and requiring Australia to establish a national preventive mechanism.

Australia's ratification of ILO conventions underpins domestic legislation, such as the *Racial, Sex, Age and Disability Discrimination Acts* and aspects of workplace legislation. As well, the terms of ILO 111, concerning discrimination in employment, are reflected in the AHRCA, which allows a person to complain to the Commission about discrimination in employment that is not covered by the *Racial, Sex, Disability or Age Discrimination Acts*. However, under the AHRCA the Commission has the power only to investigate a complaint and make recommendations.

(f) *International complaints about conduct in Australia*

Australia has ratified the First Optional Protocol to the ICCPR, which means that a person can make a complaint (communication) to the UN Human Rights Committee about a violation in Australia of their rights under the ICCPR, although a view expressed by the Committee is not binding on Australia. Similarly a person can

⁸ Communication of *Elmi v Australia*, CAT/C/22/D/120/1998, 25 May 1999.

make a communication about Australia under CAT and CERD to the relevant UN treaty bodies, although the views of the committees are non-binding.

Australia has been the subject of a number of complaints (communications) under the ICCPR, CAT and CERD, particularly in relation to mandatory detention of asylum seekers. The Australian Government has consistently rejected the correctness or legitimacy of the committees' views.

There is a procedure that allows complaints under ILO conventions about a violation in Australia of rights, although the ILO Committee can only make recommendations and requests to Australia to remedy a breach.

(g) *'Teoh'*

As the result of a 1995 High Court case – *Minister for Immigration and Ethnic Affairs v Teoh* – people in Australia are entitled to expect that administrative decision-makers will, when making decisions, act in conformity with Australia's international treaty obligations.⁹

Mr Teoh was in Australia under a temporary entry permit and was facing deportation after being convicted of drug offences. He was married to an Australian citizen and they had three children, who were Australian citizens. The High Court said that, when deciding whether to depart Mr Teoh, there was a legitimate expectation that the decision-maker would consider Australia's obligations under international human rights treaties, such as the obligation under the CRC to consider the best interests of the child.

The only 'right' that this offers a person is that the *process* – not necessarily the result – of an administrative decision will be undertaken in accordance with international treaty obligations.

(h) *An overview of anti-discrimination laws*

The most extensive implementation in Australia of international human rights standards is in federal, state and territory anti-discrimination laws. These laws give effect to many of Australia's non-discrimination obligations under CERD and CEDAW, and some aspects of the ICCPR, CRC, and ILO Conventions.

In 2010, the Australian Government announced that the four federal anti-discrimination laws – race, sex, disability and age – will be consolidated into a single act to simplify the anti-discrimination system in Australia (Attorney General's Department 2010).

The *Racial Discrimination Act 1975* (RDA) implements Australia's obligations under CERD and closely follows the wording of the Convention. The *Sex Discrimination Act 1984* (SDA) implements, to some extent, Australia's obligations under CEDAW, however, it is 'gender-neutral' in its terms and addresses discrimination on the basis

⁹ (1995) 183 CLR 273 at 291 per Mason CJ and Deane J.

of sex, not only discrimination against women. The SDA also gives effect to various provisions of ICCPR, ICESCR, and ILO 111.

Like the SDA, the *Disability Discrimination Act 1992* (DDA) implements various provisions of the ICCPR, ICESCR and ILO 111, as well as some provisions of the CRC). The *Convention on the Rights of Persons with Disabilities*, and Australia's ratification of it, occurred after Australia enacted the DDA. The federal *Age Discrimination Act 2004* (ADA) also gives effect to various provisions of the ICCPR, ICESCR, ILO 111 and CRC. For employment matters, protection is also provided under Part 3 of the *Fair Work Act* (FWA) for adverse treatment on a range of grounds including "race, colour ... religion [and] national extraction".¹⁰

The AHRCA established the Human Rights and Equal Opportunity Commission, now known as the Australian Human Rights Commission, to inquire into and attempt to conciliate complaints of discrimination under the RDA, SDA, DDA and ADA. Complaints under the FWA are made to Fair Work Australia.

The federal anti-discrimination laws operate alongside anti-discrimination laws in each state and territory:

- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1977* (NSW)
- *Anti-Discrimination Act 1992* (NT).
- *Anti-Discrimination Act 1991* (Qld)
- *Equal Opportunity Act 1984* (SA)
- *Anti-Discrimination Act 1998* (Tas)
- *Equal Opportunity Act 1995* (Vic)¹¹ and *Racial and Religious Intolerance Act 2001* (Vic)
- *Equal Opportunity Act 1984* (WA).

Under the Australian Constitution,¹² a state or territory law is invalid to the extent that it is inconsistent with a federal law but remains valid if it is consistent with, or more beneficial than, the federal law. This means that a person has access to protection against discrimination under both the federal and the state or territory system and can often choose which law to use. As well, most employment legislation prohibits discrimination at least in relation to dismissal, and sometimes more extensively, meaning that a person may have a further choice about which law to use.

The choice of law has consequences and there are many factors to be considered when deciding what legislation to complain under, such as differences in relation to:

- time limits for complaining
- the coverage of the law (eg whether contract workers are covered)
- the test to establish discrimination

¹⁰ s 351(1).

¹¹ to be replaced in 2011 by the *Equal Opportunity Act 2010* (Vic).

¹² s. 109

- the availability of a remedy
- the possible amount of available compensation
- the time delays in having a complaint dealt with
- the risk of paying legal costs.

(i) *Coverage of anti-discrimination laws*

The coverage of Australia's anti-discrimination laws is set out in Appendix E. The detail and complexity of the laws and their operation is described in Rees, Lindsay and Rice (2008). What follows is a generalised account to give an indication of how the laws work; it is not an accurate account of how each law works.

Anti-discrimination laws in Australia adopt a substantially similar approach, although the terms that are used vary considerably. Firstly, the laws identify a personal attribute and, secondly, they say that it is unlawful to discriminate on the basis of that attribute in a particular area of activity.

Common proscribed attributes are race, sex, disability, age, carer's responsibilities, marital status, sexuality, religious belief, political belief, industrial activity, criminal record and medical record (Appendix E). Of particular relevance to migrants and refugees is protection against discrimination on the grounds of race (which is usually defined to include, for example, nationality, descent, and national origin) and religion. As Appendix E shows, there is protection against discrimination on the basis of race in federal legislation and in the laws of each state and territory. For discrimination on the basis of religion, there is no protection under federal law, but there is in all states and territories except NSW and SA; NSW covers 'ethno-religious' status under the definition of 'race'. People are free to practice their religion within the bounds of criminal law (eg not so as to engage in what Australia's criminal laws would call an assault) but are protected against discrimination for their religious beliefs only where it is covered by anti-discrimination law.

Attributes are usually defined to include 'characteristics' of attributes. For example, it may a characteristic of a person's African background that they speak limited or accented English; it is usually a characteristic of a person who is a Muslim that they stop to pray during the day; and it is often a characteristic of a person with a visual impairment that they rely on aids and devices to be able to read.

Common proscribed areas of activity are employment, accommodation, provision of goods, services and facilities, education, clubs and associations, land and estates, harassment, vilification, and victimisation (Appendix E). Harassment is only unlawful on limited grounds, eg sex; vilification is unlawful principally on the ground of race and is limited to public conduct; and victimisation makes it unlawful to discriminate against someone on the ground that they have complained of discrimination.

There are two ways in which 'discrimination' is understood. One is 'direct' discrimination, which occurs when a person, on the ground of an attribute they have, is treated less favourably than another person without that attribute was, or would have been, treated (eg "you can't work here because you are African"; "you won't be served here because you are Muslim"). 'Indirect' discrimination occurs when a person is unable to comply with an unreasonable condition or requirement that most

people without the person's attribute can comply with (eg a migrant may not be able to comply with requirement that a factory worker must speak excellent English and the requirement is unnecessary in order to do the job; a Muslim woman cannot comply with a condition that restaurant patrons must be bareheaded and the condition has no reasonable justification).

Some anti-discrimination laws cover treatment which is 'harassment' (see Appendix E). Sexual harassment is unlawful under federal legislation (SDA) and in every state and territory. Disability harassment is unlawful only in federal legislation (DDA). Only Tasmania prohibits harassment on other grounds such as race and religion.

(j) Anti-vilification laws

Anti-vilification (or 'hate') laws are intended to protect people from being the subject of hateful or contemptuous comments because of an attribute they have. The act must have occurred in public – in sight or hearing of other people, or in a place the public has access to. Under the ICCPR, Australia is obliged to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", and Australia is obliged under the CRPD to protect people with disabilities from "all forms of exploitation, violence and abuse". The Australian Government has not enacted either religious hatred laws or disability vilification laws, although it has enacted limited racial hatred legislation.

Most states and territories have anti-vilification laws for some attributes, usually race (see Appendix E). However, the laws are complicated and vary between the jurisdictions. One approach is to prevent a person from doing or saying something, because of another person's race (for example), which would offend or insult the other person (eg racial vilification under the RDA). Another approach is to prevent a person from doing or saying something which would incite hatred or contempt of another person because of (for example) the other person's race.

Vilification can either form the basis of a complaint of unlawful conduct, like discrimination or, in very rare situations, it can be treated as criminal conduct. Because anti-vilification laws are seen as limiting free speech, they are generally narrow in their scope, principally applying to more 'serious' forms of conduct and only applying to 'public acts'. Extensive exceptions are made for the purposes of, for example, public, academic or religious debate.

(k) Operation of anti-discrimination and vilification laws

Australia's anti-discrimination and vilification laws require a person to make a complaint to a complaints body; either the Australian Human Rights Commission under federal laws or the relevant human rights, equal opportunity or anti-discrimination body under a state or territory law. If the complaint falls generally within the scope of the law, it is 'investigated' (ie the allegations are put to the alleged discriminator or vilifier in writing and they are asked to respond). An attempt will usually be made to resolve the complaint through a conciliation or mediation process. Complaints that cannot be resolved this way may then be the subject of formal legal proceedings in a court or tribunal.

It can take many months to conclude the conciliation or mediation process, while formal legal proceedings may take well over a year. The process is dependent on an aggrieved person making and maintaining a complaint, advocating for themselves or finding an advocate or a lawyer to represent them. The law is complex and imposes a series of procedural and legal barriers for a complainant to overcome. Legal aid is available only in very limited circumstances.

The complaints process is designed to give a remedy to a person who has been treated unfairly. It is not designed to achieve systemic change or even provide a remedy for a group of people, although a decision in an individual's case has the potential to lead to wider change. The complaints process is focussed on an individual's circumstance and the best result that can be hoped for from formal legal proceedings is usually some form of compensation. A range of outcomes can be negotiated in a conciliation or mediation process, however those processes are confidential and there is little incentive for a respondent to a complaint to make significant concessions.

A small step towards systemic change has been made in Victoria where the *Equal Opportunity Act 2010* will, when it commences in 2011, impose a general duty, for example on employers and providers of goods and services, not to engage in discrimination, sexual harassment or victimisation and to take reasonable and proportionate measures to eliminate such conduct as far as possible.

3.6 Does the law does apply equally to all?

The Australian legal system operates under 'rule of law', an aspect of which is formal equality. So the answer to the question is 'yes, the law applies equally to all', meaning that the benefits and protection of the law are available equally to – and exercises its control equally over – all people who are lawfully in Australia.

To say 'lawfully in Australia' is to identify an exception to this commitment to formal equality: migration law. Australian law applies differently to people on the basis of their migration status. People who are in Australia unlawfully (ie they are not a citizen and do not have a valid visa) have almost none of the usual entitlements of citizenship.

(a) Formal equality

Formal 'equality before the law' is a fundamental common law rule, however because Australia has no legal guarantee of human rights there is no absolute guarantee of equality before the law. There is, for example, no clear constitutional reason why the Australian Government, or the governments of the states and territories, could not make laws that discriminate on the basis of, for example, a person's race or religion.

There is effectively no constitutional limit on whether a state law can be discriminatory. To be valid, a state law must be necessary for 'good government', which has been interpreted by courts to mean that if a law is considered necessary

by a properly elected government then it is, by definition, a valid law.¹³ As a result, the states have extremely wide latitude to make laws, including discriminatory laws.

The only possible limit on whether a federal law can be discriminatory is an implied guarantee of equality in the Australian Constitution; this was suggested by Justices Deane, Toohey and Gaudron in *Leeth v Commonwealth*¹⁴ but has not been definitively decided. Laws that guarantee non-discrimination (eg the RDA) do not have constitutional status and can be over-ridden by subsequent laws. For example, the legislation that established the Northern Territory intervention explicitly avoids the effect of the RDA: “The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of ... the *Racial Discrimination Act 1975*.”¹⁵ In 2010, however, the Australian Government proposed repealing this exclusion of the RDA.¹⁶

Most anti-discrimination laws in Australia allow ‘special measures’ which are laws or conduct which treat a minority group *more* favourably. This is a form of positive discrimination, or ‘affirmative action’, designed to redress historical disadvantage and to confer benefits on a particular group in society so that they may enjoy their rights equally with other groups. Special measures do not create a set of special rights. Instead they are designed to ensure equality of *outcomes* for disadvantaged groups. Special measures would allow, for example, services to be provided only to, for example, members of a recently-arrived migrant group because of the special needs they have when compared to the rest of the population.

(b) *Substantial inequality*

The real way in which the law does not apply equally to all is not in its direct effect, but in its *indirect* effect. The law is *formally* equal in its operation but it can be differential in its *substantive* effect.

A claim that the Australian legal system treats every person equally – that all are equal before the law – is a simple statement of formal equality: the law assumes that everyone who deals with it does so with the same (and sufficient) understanding, ability and resources. This fails to recognise the substantive inequalities that exist among those who deal with the law, including differences in culture and custom, command of written and spoken English, intellectual capacity and financial resources. These differences are common among people born and raised in Australia, but are obviously more pronounced among people who are born and raised in other countries.

The Australian legal system does not make any formal concession to a person’s inability to deal with it on its own terms. This is true both in theory and in practice.

In its theory, Australian law has no principles that require it to treat people differently because of their subjective circumstances. Australia’s laws are based on the values

¹³ *BLF v Minister of Industrial Relations* (1986) 7 NSWLR 372.

¹⁴ (1992) 174 CLR 455 at 486, 502.

¹⁵ s.132 (2) *Northern Territory National Emergency Response Act 2007*.

¹⁶ Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth).

of a liberal, democratic and Christian tradition. These values underpin a legal system that privileges such things as private property rights, individual autonomy, the 'nuclear' family, logical reasoning and the authority of the state. People from other cultural and customary traditions can find themselves at odds with the Australian legal system when it fails to recognise, for example, community and collective interests and responsibility, extended family relationships, subjective perceptions of relevance and challenges or resistance to state authority.

In practice, the Australian legal system makes few efforts to moderate its formal and complex procedures and its technical English language. People from other cultural and customary traditions can find themselves confused, alienated, trapped and disadvantaged simply by the form of law, before even reaching its substance.

For a range of subjective factors, many people are not able to take advantage of the opportunities the law offers (eg documenting transactions, pursuing debts or enforcing wrongful conduct) or are more vulnerable to being exposed to the force or demands of law (eg criminal sanctions, strict liability offences or obligations to comply with contractual terms).

Some of these subjective factors are likely to arise commonly among refugees and migrants, such as ignorance of the law, poor comprehension of written English, ignorance of behavioural expectations in Australia, ignorance of usual commercial practice in Australia, ignorance of available resources in Australia and inadequate means to pay for advice and assistance.

The law in Australia makes limited concessions to these effective inequalities. Some commercial transactions can be undone or revised because the circumstances in which they occurred were unfair (eg under the *Trade Practices Act 1974* (Cth) or state and territory fair trading laws) but access to these remedies usually requires knowledge and resources. No concession, however, is made for criminal liability; in sentencing, criminal penalties can be reduced by a court, taking into account subjective considerations (such as the person being a newly-arrived refugee or migrant), but only on a discretionary basis in each case and depending, to some degree, on someone advocating effectively on the person's behalf.

The unequal effect of law on people in Australia is acknowledged principally through mechanisms that address or compensate for the subjective factors that put people at a disadvantage. State-sponsored measures include legal aid, community legal centres, translated publications and migrant and neighbourhood resource centres. Other mechanisms are charitable and faith-based groups that support people of particular cultures or faiths or with a particular characteristic, such as youth, old age or a form of disability.

3.7 The impact of the Australian domestic legal system on refugees and migrants from African countries

Assessing the impact of the Australian domestic legal system on refugees and migrants requires a substantial empirical study. In the absence of such a study, the following observations are based on experience, inference and reason, and on recent reports of refugees and migrant diasporas in Australia.

(a) *Language barriers*

Australia's laws are written only in English. There is no system that ensures that there is an explanation of laws in community languages. Agencies such as community legal centres, migrant resource centres, government departments and statutory authorities provide material in community languages from time to time, however they are not obliged to do so and are not funded to do so consistently or comprehensively.

Few lawyers speak a language other than English, and fewer still speak a language common among the refugee and migrant communities that have arrived in the country in recent years. There is no system that reliably records or refers to lawyers with a language other than English.

Dealings with lawyers can be conducted through an interpreter. However, there is no enforceable right to an interpreter in Australia, and so the state cannot be forced to provide one. As a matter of practice, however, the state does provide an interpreter in many circumstances, through its national accredited translation interpreter service.¹⁷ This service is available in most languages, by telephone¹⁸ or in person. It is available for a fee when speaking to a private lawyer and usually without charge when speaking to a lawyer at a community legal centre or legal aid office. Courts and tribunals usually provide interpreters without charge for court and tribunal hearings, but not for related dealings that happen outside court.

An interpreter is provided in public matters because the absence of an interpreter can compromise the integrity of transactions, such as a police interview or a refugee tribunal hearing. However, there is no obligation on anyone to provide an interpreter when the dealings occur in private (eg buying a car or borrowing money) and a refugee or migrant must make their own arrangements, usually involving a family friend without training or credentials.

DIAC does provide refugees with free English language tuition, however, these services are limited to around 500 hours. As Hancock argues, "for African refugees who have often had a rural background with little or no formal education the six month [language] services is too short" to develop the language required to fully participate in the Australian community (Hancock 2009, p 13).

(b) *Concepts in the legal system*

The legal system is a significant social phenomenon that refugees and migrants must learn and adapt to on settling in Australia. The urgency with which they must do this depends on their personal circumstances: the kind of dealings they have with the law (usually involuntary) and the people and organisations able to assist them.

Refugees and migrants' engagement with the legal system starts even before arriving in Australia, with the process of applying for refugee or immigrant status. For example, Australian immigration law requires an applicant to provide information

¹⁷ < www.naati.com.au > at 2 May 2010.

¹⁸ < www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/ > at 2 May 2010.

which is relevant to the particular immigration category. In Australian law, the idea of 'relevance' has a precise meaning: something is relevant if it has a rational connection with the matter to be decided. This narrow idea of relevance is very strong in the Anglo-Australian legal tradition, and will often exclude information which an applicant wants taken into account. In Australia, refugees and migrants will encounter – and may be frustrated by – the idea of relevance in many of their dealings with the legal system.

Once in Australia a refugee or migrant will have to complete forms (Centrelink, housing, schooling, transport, employment etc), many of which will be in 'plain English' but which assume cultural understanding of the Australian legal system. For example, a question that asks for 'relevant details' assumes that the person will understand the idea of relevance and will volunteer what is expected. Similarly, questions that ask for 'next of kin', 'previous experience' or 'special circumstances' all assume that the person understands the essential nature of the transaction and can volunteer the correct required information.

People familiar with Australian law assume in most daily transactions that the state is benign and that the law is transparent, consistent and unbiased. The state itself expects people to deal with it on this basis and expects people to provide frank, honest and complete information when required. Many refugees and migrants have a very different experience of the role of the state and will fear malevolent motives on the part of the state or its officers. A refugee or migrant's failure to volunteer required or relevant information – through fear or ignorance – may be judged according to local expectations of conduct and could be seen and dealt with as evasive, suspicious, dishonest or fraudulent.

(c) *Anti-discrimination and vilification laws*

Apart from the migration laws that enable or prevent lawful arrival and presence in Australia, there are no laws made especially for the benefit of – or especially to affect – refugees and migrants.

Anti-discrimination laws protect refugees and migrants (and anyone else) if they are discriminated against because of their race, but only in the areas of activity covered by the laws (eg employment, provision of goods and services, education). 'Race' is not intended to be a scientific term; it is used as a shorthand term to refer to distinguishing features of a person's identity, such as skin colour, descent or ancestry, nationality and national or ethnic origin. In Tasmania and the Northern Territory, a person's status as an immigrant is itself a basis for unlawful discrimination.¹⁹

Anti-discrimination laws in Australia protect everyone against discrimination on a range of grounds that are not particular to refugees and migrants, such as sex, age, disability and sexuality. These anti-discrimination laws are of limited use in preventing future conduct or systemic conduct, however, what they do most reliably is provide an avenue for a person to obtain some redress and satisfaction for something that was done to them.

¹⁹ s 3 Anti-Discrimination Act (Tas); s 4 Anti-Discrimination Act (NT).

As well as anti-discrimination laws, refugees and migrants are offered protection by anti-vilification laws. Those laws too have been of limited use. Because they operate as a constraint on free speech, the conduct needs to be quite serious before there is a breach of the law. The conduct must also be a 'public act'. The federal law (the RDA) applies an objective standard of what is 'reasonably likely' to offend, while the state and territory laws apply an objective standard of whether a third party is likely to be moved to hatred. In both cases they do not consider how a person was actually made to feel by the conduct directed towards them.

Many complaints of discrimination and vilification are resolved by discussion and agreement ('conciliation' or 'mediation') facilitated by the agencies that receive the complaints (ie the Australian Human Rights Commission and various state and territory bodies). Complaints that are not resolved can be litigated in a court or tribunal, where race discrimination complaints have a notoriously low success rate. The low success rate can be attributed to a number of different, possibly inter-related, factors:

- complaints that reach the hearing stage may not be as strong as those that are resolved by agreement beforehand
- complainants are often unrepresented because they cannot afford a lawyer and legal aid is not available
- unrepresented complainants have to run a legal case in a language other than their first language
- in race discrimination matters it is very difficult for a complainant to discharge the burden of proof,²⁰ no doubt resulting in under-reporting of discriminatory conduct.

(d) *War crime perpetrators*

A complex issue facing some migrant and refugee communities relates to the limited government infrastructure to deal with perpetrators of international crimes who are living in Australia.

A recent Lowy Institute paper on this issue argues that Australia lets in many potential war criminals through its refugee and migration program (Hanson 2009, p 6). DIAC has a War Crimes Screening Unit (WSCU), which aims to identify whether incoming migrants and refugees are potentially war criminals. As of 2006 the WSCU had a list of 7,600 identities living in Australia which it suspects of involvement in an international crime (Hanson 2009, pp 6-7). This problem is likely to increase in Australia commensurate with the number of refugees accepted from current and former war-torn states, many of which are in Africa (Attard 2010).

Unlike other countries, there are very limited state resources available for victims of war crimes living in Australia to investigate perpetrators who may also be living in Australia²¹ (Hanson 2009). A Senate hearing last year revealed that the WSCU has

²⁰ cf Jonathon Hunyor, 'Skin-department: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535.

²¹ With the exception of torture crimes if the Bill inserting torture into the *Criminal Code* (Cth) passes – as discussed above.

only five staff to screen all incoming migrants and refugees applicants (Hanson and Ierace 2010). As Hanson and Ierace point out, this is an average of “34,000 applications to screen per staff member” in the WCSU (Hanson and Ierace 2010). This has led to a situation in some refugee and migrant communities where both victims and perpetrators of international crimes live together. A refugee victim of atrocities in Rwanda, Aubert Ruzigandakwe, said recently to ABC Radio that he knows potential Rwandan perpetrators of war crimes living in Australia (Cohen 2009). Cohen catalogues some conflicts and social cohesion problems in refugee and migrant communities in Australia that have arisen from this situation.

In the absence of a state-run mechanism to investigate and perpetrate international crimes, some refugee communities are collecting evidence about these alleged perpetrators themselves (Attard 2010). However, some experts fear that this community-driven response may lead to vigilantism and possibly jeopardise future international or domestic criminal investigations (Attard, 2010).

3.8 A framework for considering the Australian legal system

Certain areas of Australian law are likely to challenge the cultural and customary traditions of some refugees and migrants because of the cultural assumptions embedded in Australian law and society.

Australian family law, which is a significant consideration for African communities in Australia, makes assumptions that may be at odds with the values and practices of refugees and migrants on issues such as: property ownership; responsibility for care and support of family members; and the nature of relationships between a wife and husband (eg an assumption of monogamy), between parents and children and between children and other family members, such as grandparents, aunts and uncles.

Criminal law also operates in ways that may be at odds with the values and practices of refugees and migrants. For example, strict liability offences that assume knowledge of the law; the right to silence, which assumes knowledge of, and confidence in, the presumption of innocence; and conversely, the obligation to identify oneself to police, which assumes trust in the integrity of the police.

Transactional law such a consumer and contract law assumes knowledgeable participation in commercial exchanges, full disclosure of interests, individual responsibility for obligations, and accepting the legitimacy of charging interest and fees.

Without a much more detailed understanding of the ways in which African cultural and customary traditions will be at odds with those of Australia, it is not useful to speculate on the areas of Australian law where African refugees and migrants will have difficulty. These will best be identified in consultation with African refugees and migrants who have had experience of Australia law and society.

3.9 Conclusion

The account in Part A indicates that refugees and migrants from Africa arrive in Australia with little experience of the legal protection of their human rights. Part B

illustrates that the legal system in Australia offers stronger protection for human rights, principally through domestic laws which implement international treaty obligations, and stable liberal democratic institutions to give effect to those laws.

But the western cultural assumptions which underpin Australia's liberal democratic institutions also support a legal system which is, in many ways, unfamiliar to African refugees and migrants. Their access to the protection of Australia's legal system may be as much a matter of reconciling different cultures beliefs and practices in the ordinary operation of law as it is a matter of using laws that address their situation, such as anti-discrimination and anti-vilification laws.

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5 Appendix A: African countries²² bound by²³ UN human rights treaties (25 April 2010)

	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
1.	Algeria	98	14 Feb 1972	21 Feb 1963 +protocol	12 Sep 1989	12 Sep 1989 +1 st OP	12 Sep 1989	22 May 1996	16 Apr 1993 + armed conflict and prostitution OPs	21 Apr 2005	4 Dec 2009
2.	Angola	1*		23 Jun 1981 +protocol		10 Jan 1992 +1 st OP	10 Jan 1992	17 Sep 1986 + protocol	5 Dec 1990 + prostitution OP		
3.	Benin	24.4	30 Nov 2001	04 Apr 1962 +protocol	12 Mar 1992 +protocol	12 Mar 1992 +1 st OP	12 Mar 1992	12 Mar 1992	3 Aug 1990 + armed conflict and prostitution OPs		

²² Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings:

<http://unstats.un.org/unsd/methods/m49/m49regin.htm> .

²³ by ratification, accession or succession; states may have signed, but have not yet ratified, acceded or succeeded. This chart does not take account of reservations to the various treaties.

²⁴ % Muslim population: Data taken from Pew Forum on Religious and Public Affairs Report, titled 'Mapping the Global Muslim Population', available at <http://pewforum.org/docs/?DocID=450> (last accessed 25 April 2010)

* Denotes estimated figures based on population surveys

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
4.	Botswana	0.4	20 Feb 1974	06 Jan 1969 +protocol	8 Sep 2000	8 Sep 2000		13 Aug 1996 + protocol	14 Mar 1995 + armed conflict and prostitution OPs		
5.	Burkina Faso	59	18 Jul 1974	18 Jun 1980 +protocol	4 Jan 1999	4 Jan 1999 +1 st OP	4 Jan 1999	14 Oct 1987 + protocol	31 Aug 1990 + armed conflict and prostitution OPs	26 Nov 2003	23 Jul 2009 + protocol
6.	Burundi	2*	27 Oct 1977	19 Jul 1963 +protocol		9 May 1990	9 May 1990		19 Oct 1990 + armed conflict and prostitution OPs		
7.	Cameroon	17.9	24 Jun 1971	23 Oct 1961 +protocol	19 Dec 1986	27 Jun 1984 +1 st OP	27 Jun 1984	23 Aug 1994 + protocol	11 Jan 1993		
8.	Cape Verde	<1	3 Oct 1979	Protocol only: 09 Jul 1987	4 Jun 1992	6 Aug 1993 +1 st & 2 nd OP	6 Aug 1993	5 Dec 1980	4 Jun 1992 + armed conflict and prostitution OPs	16 Sep 1997	

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
9.	Central African Republic	8.9	16 Mar 1971	04 Sep 1962 +protocol		8 May 1981 +1 st OP	8 May 1981	21 Jun 1991	23 Apr 1992		
10.	Chad	55.8	17 Aug 1977	19 Aug 1981 +protocol	9 Jun 1995	9 Jun 1995 +1 st OP	9 Jun 1995		2 Oct 1990 + armed conflict and prostitution OPs		
11.	Comoros	98.3	27 Sep 2004					31 Oct 1994	22 Jun 1993		
12.	Congo	1.4	11 Jul 1988	15 Oct 1962 +protocol	30 Jul 2003	5 Oct 1983 +1 st OP	5 Oct 1983	26 Jul 1982	14 Oct 1993 + prostitution OP		
13.	Congo, Democratic Republic of the	1.6	21 Apr 1976	08 Dec 1961 +protocol	18 Mar 1996	1 Nov 1976 +1 st OP	1 Nov 1976	17 Oct 1986	27 Sep 1990 + armed conflict and prostitution OPs		
14.	Côte d'Ivoire	36.7	4 Jan 1973	19 Jul 1965 +protocol	18 Dec 1995	26 Mar 1992 +1 st OP	26 Mar 1992	18 Dec 1995	4 Feb 1991		

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
15.	Djibouti	96.9		09 Aug 1977 +protocol	5 Nov 2002	5 Nov 2002 +1 st & 2 nd OP	5 Nov 2002	2 Dec 1998	6 Dec 1990 + armed conflict OP		
16.	Egypt	94.6	1 May 1967	22 May 1981 +protocol	25 Jun 1986	14 Jan 1982	14 Jan 1982	18 Sep 1981	6 Jul 1990 + armed conflict and prostitution OPs	19 Feb 1993	14 Apr 2008
17.	Equatorial Guinea	4	8 Oct 2002	07 Feb 1986 +protocol	8 Oct 2002	25 Sep 1987 +1 st OP	25 Sep 1987	23 Oct 1984 + protocol	15 Jun 1992 + prostitution OP		
18.	Eritrea	36.5	31 Jul 2001			22 Jan 2002	17 Apr 2001	5 Sep 1995	3 Aug 1994 + armed conflict and prostitution OPs		
19.	Ethiopia	33.9	23 Jun 1976	10 Nov 1969 +protocol	14 Mar 1994	11 Jun 1993	11 Jun 1993		14 May 1991		
20.	Gabon	9.5	29 Feb 1980	27 Apr 1964 +protocol	8 Sep 2000 +protocol	21 Jan 1983 +1 st OP	21 Jan 1983	21 Jan 1983 + protocol	9 Feb 1994 + prostitution OP		1 Oct 2007

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
21.	Gambia	95*	29 Dec 1978	07 Sep 1966 +protocol	.	22 Mar 1979	29 Dec 1978	16 Apr 1993	8 Aug 1990	.	.
22.	Ghana	15.9	8 Sep 1966	18 Mar 1963 +protocol	7 Sep 2000 +protocol	7 Sep 2000 +1 st OP	7 Sep 2000	2 Jan 1986	5 Feb 1990	7 Sep 2000	.
23.	Guinea	84.4	14 Mar 1977	28 Dec 1965 +protocol	10 Oct 1989 +protocol	24 Jan 1978 +1 st OP	24 Jan 1978	9 Aug 1982	13 Jul 1990	7 Sep 2000	8 Feb 2008 +protocol
24.	Guinea-Bissau	42.2	.	11 Feb 1976 +protocol	.	.	2 Jul 1992	23 Aug 1985 + protocol	20 Aug 1990	.	.
25.	Kenya	7	13 Sep 2001	16 May 1966 +protocol	21 Feb 1997	1 May 1972	1 May 1972	9 Mar 1984	30 Jul 1990 + armed conflict OP	.	19 May 2008
26.	Lesotho	<0.1	4 Nov 1971	14 May 1981 +protocol	12 Nov 2001	9 Sep 1992 +1 st OP	9 Sep 1992	22 Aug 1995 + protocol	10 Mar 1992 + armed conflict and prostitution OPs	16 Sep 2005	2 Dec 2008a
27.	Liberia	12.2	5 Nov 1976	15 Oct 1964 +protocol	22 Sep 2004	22 Sep 2004 +1 st & 2 nd OP	22 Sep 2004	17 Jul 1984	4 Jun 1993	.	.

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
28.	Libyan Arab Jamahiriya	96.6	3 Jul 1968		16 May 1989	15 May 1970 +1 st OP	15 May 1970	16 May 1989 + protocol	15 Apr 1993 + armed conflict and prostitution OPs	18 Jun 2004	
29.	Madagascar	1.1	7 Feb 1969	18 Dec 1967	13 Dec 2005	21 Jun 1971 +1 st OP	22 Sep 1971	17 Mar 1989	19 Mar 1991 + armed conflict and prostitution OPs		
30.	Malawi	12.8	11 Jun 1996	10 Dec 1987 +protocol	11 Jun 1996	22 Dec 1993 +1 st OP	22 Dec 1993	12 Mar 1987	2 Jan 1991 + prostitution OP		27 Aug 2009
31.	Mali	92.5	16 Jul 1974	02 Feb 1973 +protocol	26 Feb 1999 +protocol	16 Jul 1974 +1 st OP	16 Jul 1974	10 Sep 1985 + protocol	20 Sep 1990 + armed conflict and prostitution OPs	5 Jun 2003	7 Apr 2008 +protocol
32.	Mauritania	99.1	13 Dec 1988	05 May 1987 +protocol	17 Nov 2004	17 Nov 2004	17 Nov 2004	10 May 2001	16 May 1991 + prostitution OP	22 Jan 2007	

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
33.	Mauritius	16.6	30 May 1972		9 Dec 1992	12 Dec 1973 +1 st OP	12 Dec 1973	9 Jul 1984 + protocol	26 Jul 1990 + armed conflict OP		
34.	Morocco	99*	18 Dec 1970	07 Nov 1956 +protocol	21 Jun 1993	3 May 1979	3 May 1979	21 Jun 1993	21 Jun 1993 + armed conflict and prostitution OPs	21 Jun 1993	8 Apr 2009 + protocol
35.	Mozambique	22.8	18 Apr 1983	16 Dec 1983 +protocol	14 Sep 1999	21 Jul 1993 + 2 nd OP		21 Apr 1997 + protocol	26 Apr 1994 + armed conflict and prostitution OPs		
36.	Namibia	0.4	11 Nov 1982 9	17 Feb 1995	28 Nov 1994	28 Nov 1994 +1 st & 2 nd OP	28 Nov 1994	23 Nov 1992 + protocol	30 Sep 1990 + armed conflict and prostitution OPs		4 Dec 2007 +protocol
37.	Niger	98.6	27 Apr 1967	25 Aug 1961 +protocol	5 Oct 1998	7 Mar 1986 +1 st OP	7 Mar 1986	8 Oct 1999 + protocol	30 Sep 1990	18 Mar 2009	24 June 2008 +protocol

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
38.	Nigeria	50.4	16 Oct 1967	23 Oct 1967 +protocol	28 Jun 2001 + protocol	29 Jul 1993	29 Jul 1993	13 Jun 1985 + protocol	19 Apr 1991	27 Jul 2009	
39.	Rwanda	1.8	16 Apr 1975	03 Jan 1980 +protocol	15 Dec 2008	16 Apr 1975 + 2 nd OP	16 Apr 1975	2 Mar 1981	24 Jan 1991 + armed conflict and prostitution OPs	15 Dec 2008	15 Dec 2008 +protocol
40.	Sao Tome and Principe	3*		01 Feb 1978 +protocol				3 Jun 2003	14 May 1991		
41.	Senegal	96	19 Apr 1972	02 May 1963 +protocol	21 Aug 1986 +protocol	13 Feb 1978 +1 st OP	13 Feb 1978	5 Feb 1985 + protocol	31 Jul 1990 + armed conflict and prostitution OPs	9 Jun 1999	
42.	Seychelles	1.1	7 Mar 1978	23 Apr 1980 +protocol	5 May 1992	5 May 1992 +1 st & 2 nd OP	5 May 1992	5 May 1992	7 Sep 1990		2 Oct 2009
43.	Sierra Leone	71.3	2 Aug 1967	22 May 1981 +protocol	25 Apr 2001 +protocol	23 Aug 1996 +1 st OP	23 Aug 1996	11 Nov 1988	18 Jun 1990 + armed conflict OP		
44.	Somalia	98.5	26 Aug 1975	10 Oct 1978	24 Jan 1990	24 Jan 1990	24 Jan 1990				

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
				+protocol		+1 st OP					
45.	South Africa	1.5	10 Dec 1998	12 Jan 1996 +protocol	10 Dec 1998	10 Dec 1998 +1 st & 2 nd OP		15 Dec 1995 + protocol	16 Jun 1995 + armed conflict and prostitution OP's		30 Nov 2007 +protocol
46.	Sudan	71.3	21 Mar 1977	22 Feb 1974 +protocol		18 Mar 1986	18 Mar 1986		3 Aug 1990 + armed conflict and prostitution OPs		24 Apr 2009 + protocol
47.	Swaziland	0.2	7 Apr 1969	14 Feb 2000 +protocol	26 Mar 2004		26 Mar 2004	26 Mar 2004	7 Sep 1995		
48.	Tanzania, United Republic of	30.2	27 Oct 1972	12 May 1964 +protocol		11 Jun 1976	11 Jun 1976	20 Aug 1985	10 Jun 1991		10 Nov 2009 + protocol
49.	Togo	12.2	1 Sep 1972	27 Feb 1962 +protocol	18 Nov 1987	24 May 1984 +1 st OP	24 May 1984	26 Sep 1983	1 Aug 1990 + armed conflict and prostitution OPs		

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	Country	%M ²⁴	CERD	Refugee Convention + protocol	OPCAT	ICCPR + protocols	ICESCR	CEDAW + protocol	CRC + protocols	MWC	CRPD + protocol
50.	Tunisia	99.5	13 Jan 1967	24 Oct 1957	23 Sep 1988	18 Mar 1969		20 Sep 1985 + protocol	30 Jan 1992 + armed conflict and prostitution OPs		2 Apr 2008 +protocol
51.	Uganda	12.1	21 Nov 1980	27 Sep 1976 +protocol	3 Nov 1986	21 Jun 1995	21 Jan 1987	22 Jul 1985	17 Aug 1990 + prostitution OP	14 Nov 1995	25 Sep 2008 +protocol
52.	Western Sahara Territory (Sahrawi Arab Democratic Republic)	99.4									
53.	Zambia	0.4	4 Feb 1972	24 Sep 1969 +protocol	7 Oct 1998	10 Apr 1984 +1 st OP	10 Apr 1984	21 Jun 1985	6 Dec 1991		
54.	Zimbabwe	0.9	13 May 1991	25 Aug 1981 +protocol		13 May 1991	13 May 1991	13 May 1991	11 Sep 1990		

6 Appendix B: African Union countries²⁵ bound by²⁶ African Union human rights-related treaties (11 November 2009)²⁷

Country	%M ²⁸	Human Rights ²⁹	Refugees ³⁰	Rights of the Child ³¹	Rights of Women ³²
Algeria	98	1 Mar 1987	24 May 1974	8 Jul 2003	
Angola	1*	2 Mar 1990	30 Apr 1980	11 Apr 1992	30 Aug 2007
Benin	24.4	20 Jan 1986	26 Feb 1973	17 Apr 1997	20 Sep 2005
Botswana	0.4	17 Jul 1986	4 May 1995	10 Aug 2001	
Burkina Faso	59	6 Jul 1984	19 Mar 1974	8 Jun 1992	9 Jun 2006✓
Burundi	2*	28 Jul 1989	31 Oct 1975	28 Jun 2004	
Cameroon	17.9	20 Jun 1989	7 Sep 1985	5 Sep 1997	
Cape Verde	<1	2 Jun 1987	16 Feb 1989	20 Jul 1993	21 Jun 2005
Central African Republic	8.9	26 Apr 1986	23 Jul 1970		
Chad	55.8	9 Oct 1986	12 Aug 1981	30 Mar 2000	
Comoros	98.3	1 Jun 1986	2 Apr 2004	18 Mar 2004	18 March 2004
Congo	1.4	9 Dec 1982	16 Jan 1971	8 Jul 2003	

²⁵ Members of the African Union.

²⁶ Ratification, accession or succession; states may have signed, but have not yet ratified, acceded or succeeded.

²⁷ Data taken from African Union Treaty Database: <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>; See also: Viljoen (2008, pp 306-308), Table 6.1.

²⁸ % Muslim population: Data taken from Pew Forum on Religious and Public Affairs Report, titled 'Mapping the Global Muslim Population', available at <http://pewforum.org/docs/?DocID=450> (last accessed 25 April 2010)

* Denotes estimated figures based on population surveys

²⁹ African Charter on Human and Peoples' Rights

³⁰ AU Convention Governing the Specific Aspects of Refugee Problems in Africa

³¹ African Charter on the Rights and Welfare of the Child

³² Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

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Country	%M ²⁸	Human Rights ²⁹	Refugees ³⁰	Rights of the Child ³¹	Rights of Women ³²
Congo, Democratic Republic of the	1.6	20 Jul 1987	14 Feb 1973		9 Jun 2008
Côte d'Ivoire	36.7	6 Jan 1992	26 Feb 1998	1 Mar 2002	
Djibouti	96.9	11 Nov 1991			2 Feb 2005
Egypt	94.6	20 mar 1984	12 Jun 1980	9 May 2001	
Equatorial Guinea	4	7 Apr 1986	8 Sep 1980	20 Dec 2002	
Eritrea	36.5	14 Jan 1999		22 Dec 1999	
Ethiopia	33.9	15 Jun 1998	15 Oct 1973	2 Oct 2002	
Gabon	9.5	20 Feb 1986	21 Mar 1986	18 May 2007	
Gambia	95*	8 Jun 1983	12 Nov 1980	14 Dec 2000	25 May 2005
Ghana	15.9	24 Jan 1989	19 Jun 1975	10 Jun 2005	13 Jun 2007
Guinea	84.4	16 Feb 1982	18 Oct 1972	27 May 1999	
Guinea-Bissau	42.2	4 Dec 1985	26 un 1989	19 Jun 2008	19 Jun 2008
Kenya	7	23 Jan 1992	23 Jun 1992	25 Jul 2000	
Lesotho	<0.1	10 Feb 1992	18 Nov 1988	27 Sep 1999	26 Oct 2004
Liberia	12.2	4 Aug 1982	1 Oct 1971	1 Aug 2007	14 Dec 2007
Libyan Arab Jamahiriya	96.6	19 Jul 1986	25 Apr 1981	23 Sep 2000	23 May 2004
Madagascar	1.1	9 Mar 1992		30 Mar 2005	
Malawi	12.8	17 Nov 1989	4 Nov 1987	16 Sep 1999	20 May 2005
Mali	92.5	21 Dec 1981	10 Oct 1981	3 Jun 1998	13 Jan 2005
Mauritania	99.1	14 Jun 1986	22 Jul 1972	21 Sep	21 Sep

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Country	%M ²⁸	Human Rights ²⁹	Refugees ³⁰	Rights of the Child ³¹	Rights of Women ³²
				2005	2005
Mauritius	16.6	19 Jun 1992		14 Feb 1992	
Mozambique	22.8	22 Feb 1989	22 Feb 1989	15 Jul 1998	9 Dec 2005
Namibia	0.4	30 Jul 1992		23 Jul 2004	11 Aug 2004
Niger	98.6	15 Jul 1986	16 Sep 1971	11 Dec 1996	
Nigeria	50.4	22 Jun 1983	23 May 1986	23 Jul 2001	16 Dec 2004
Rwanda	1.8	15 Jul 1983	19 Nov 1979	11 May 2001	25 Jun 2004
Sahrawi Arab Democratic Republic (Western Sahara Territory)	99.4	2 May 1986			
Sao Tome and Principe	3*	23 May 1986			
Senegal	96	13 Aug 1982	1 April 1971	29 Sep 1998	27 Dec 2004
Seychelles	1.1	13 April 1992	11 Sep 1980	13 Feb 1992	9 Mar 2006
Sierra Leone	71.3	21 Sep 1983	28 Dec 1987	13 May 2005	
Somalia	98.5	31 Jul 1985			
South Africa	1.5	9 Jul 1996	15 Dec 1992	7 Jan 2000	17 Dec 2004
Sudan	71.3	18 Feb 1986	24 Dec 1972	30 Jul 2005	
Swaziland	0.2	15 Sep 1995	16 Jan 1989		
Tanzania, United Republic of	30.2	18 Feb 1984	10 Jan 1975	16 Mar 2003	3 Mar 2007
Togo	12.2	5 Nov 1982	10 Apr 1970	5 May 1998	12 Oct 2005
Tunisia	99.5	16 Mar 1983	17 Nov 1989		
Uganda	12.1	10 May 1986	24 Jul 1987	17 Aug	

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Country	%M ²⁸	Human Rights ²⁹	Refugees ³⁰	Rights of the Child ³¹	Rights of Women ³²
				1994	
Zambia	0.4	10 Jan 1984	30 Jul 1973	2 Dec 2008	2 May 2006
Zimbabwe	0.9	30 May 1986	28 Sep 1985	19 Jan 1995	15 Apr 2008

7 Appendix C: Viljoen (2008): Domestic application of international human rights law and, in particular, the Africa Charter, in African states

- In Benin there is a trend, not consistently followed, of the Constitutional Court invoking the African Charter in its reasoning, and relying on it when the Constitution is silent on a point (p 544).
- In Botswana the Court of Appeal has said that domestic law should be interpreted so as to be consistent with obligations under the African Charter (p 544).
- In Congo provisions of the African Charter are not taken into account by judges in their decision-making (p546).
- In Ghana none of the international human rights treaties that have been ratified are enacted in domestic law. However, the Supreme Court has recognised that provision of the African Charter can be relied on in argument (pp 546-547).
- In Lesotho the Court of Appeal has been prepared to rely on human rights treaties to support its reasoning (p 548).
- In Malawi the Universal Declaration of Human Rights is incorporated into the Constitution; the Court of Appeal has said that that the provisions of the African Charter cannot be relied on as it has not been enacted into domestic law (p 549).
- In Namibia the High Court has recognised that ratification of the African Charter has incorporated it into domestic law and has relied human rights treaties to support its reasoning (pp 550-551).
- In Nigeria the African Charter has been enacted into domestic law and the Constitution contains human rights guarantees. The High Court of Lagos has, in some cases, continued to give effect to the Charter even when the Constitution had been suspended and, in other cases, has refused to do so (pp 551-556).
- In Senegal the Constitution gives international agreements status above domestic laws other than the Constitution itself, but Viljoen does not say what this has meant in practice (p 556).
- In South Africa the Constitution contains a Bill of Rights, which is one of the most comprehensive statements of justifiable contemporary human rights in any constitution. South Africa is also a party to the African Charter. Although Viljoen regrets that courts have not paid more attention to it (pp 556-560), the lack of attention is understandable in light of the terms of the Bill of Rights, which has its sources in UN instruments.

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- In Tanzania, although the African Charter has not been invoked by courts, a constitutional bill of rights requires domestic law to be interpreted “in conformity” with it (560).
- In Uganda no use seems to have been made of the African Charter by the courts (pp 561-562).
- In Zambia the High Court has suggested that international human rights treaties to which Zambia is a party, including the African Charter, may be self-executing and therefore be part of domestic law (pp 562-563).
- In Zimbabwe the Supreme Court has given effect to a common law rule that requires laws to be interpreted, as far as possible, to conform with international treaty obligations (p 563).

8 Appendix D: Status of Refugee Convention and UN human rights treaties in Australia

Treaty	Aust a party	Domestic status	Domestic remedy for rights violations
Refugee Convention and Protocol	✓	<p>Given effect to in the <i>Migration Act 1958</i> (Cth) but on more limited terms, eg:</p> <p>not in “excised Australian territory”</p> <p>not unless a valid visa application has been lodged</p> <p>subject to adverse inferences an asylum seeker having no documentation</p> <p>only when “persecution” was systematic and discriminatory involving serious harm and a Convention ground was “the essential or significant reason” for fear.</p>	Administrative and judicial review of decisions.
International Convention on the Elimination of All Forms of Racial Discrimination.	✓	<i>Racial Discrimination Act 1975</i> (Cth) ³³ ; all state and territory anti-discrimination laws	For race discrimination and vilification: individual complaint, agency investigation, agency mediation or adversarial hearing, and order for payment of compensation; access to UN complaints mechanisms. Australia is accountable through its reporting to the UN.
International Covenant on Economic, Social and Cultural Rights.	✓	It has not been enacted into domestic law. Some rights are given effect to as discretionary state services eg education, health and housing.	None.

³³ The Australian Government announced on 21 April 2010 that it intends to incorporate all federal anti-discrimination legislation (including the *Racial Discrimination Act*) into a single piece of legislation.

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Treaty	Aust a party	Domestic status	Domestic remedy for rights violations
International Covenant on Civil and Political Rights.	✓	It has not been enacted into domestic law. It is scheduled to the <i>Australia Human Rights Commission Act 1986</i> (Cth). Some rights are given effect to in domestic legislation and in common law rules.	The Australian Human Rights Commission has power to investigate violations but has no enforceable remedial power. Common law entitlement to pursue personal remedies for denial of common law rights (eg right to fair trial). Australia is accountable through its reporting to the UN.
First Optional Protocol to the International Covenant on Civil and Political Rights.	✓	Its operation does not require that it be enacted into domestic law. .	It enables the access to UN complaints mechanisms referred to above. Australia is accountable through its responses to views of the Human rights Committee, and its reporting to the UN.
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.	✓	The <i>Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010</i> amended the <i>Criminal Code</i> (Cth) by banning the reintroduction of the death penalty at the Commonwealth or state level.	n/a
Convention on the Elimination of All Forms of Discrimination against Women.	✓	<i>Sex Discrimination Act 1984</i> (Cth) ³⁴ ; all state and territory anti-discrimination laws	For sex discrimination: individual complaint, agency investigation, agency mediation or adversarial hearing, and order for payment of compensation; access to UN complaints mechanisms. Australia is accountable through its reporting to the UN.
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination	✓	Its operation does not require that it be enacted into domestic law.	It enables the access to UN complaints mechanisms referred to above. Australia is accountable through its responses to views of the Human rights Committee, and its reporting to

³⁴ Commonwealth Government announced on 21 April 2010 that there will legal reform to include all Commonwealth anti-discrimination legislation (including the *Sex Discrimination Act*) into a single piece of legislation.

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Treaty	Aust a party	Domestic status	Domestic remedy for rights violations
against Women.			the UN.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.	✓	The <i>Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010</i> introduces a crime of torture into the <i>Criminal Code</i> (Cth).	Criminal prosecution by the state; individual access to UN complaints mechanisms. Australia is accountable through its responses to views of the Human Rights Committee, and its reporting to the UN. Proposed legislative changes will create an offence of torture for acts carried out by a person residing in Australia, where those acts occurred either within or wholly outside Australia.
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	☒	Treaty was signed in 2009, but the decision to ratify is pending and possible in 2010. Ratifying states will be required to establish a national preventive mechanism.	It will enable UN inspections; Australia will be accountable through its reporting to the UN.
Convention on the Rights of the Child.	✓	It has not been enacted into domestic law. It is a declared instrument under the <i>Australian Human Rights Commission Act 1986</i> (Cth). Some rights are given effect to in domestic legislation and in common law rules.	The Australian Human Rights Commission has power to investigate violations but has no enforceable remedial power. Australia is accountable through its reporting to the UN.
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.	✓	The Australian Defences Forces comply with its terms, and the <i>Criminal Code</i> (Cth) has been amended to prohibit the recruitment or use in hostilities of children under 18 years of age.	Criminal sanctions for non-compliance

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Treaty	Aust a party	Domestic status	Domestic remedy for rights violations
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.	✓	The <i>Criminal Code</i> (Cth), the <i>Crimes Act 1914</i> (Cth) and the <i>Customs Act 1901</i> (Cth) have been amended to criminalise child sex tourism, slavery, trafficking and online child sexual abuse	Criminal sanctions
Convention on the Rights of Persons with Disabilities .	✓	The <i>Disability Discrimination Act 1992</i> (Cth) was enacted before Australia ratified the Convention, but it gives effect to much of the Convention.	For disability discrimination: individual complaint, agency investigation, agency mediation or adversarial hearing, and order for payment of compensation; access to UN complaints mechanisms. Australia is accountable through its reporting to the UN.
Optional Protocol to the Convention on the Rights of Persons with Disabilities	✓	Its operation does not require that it be enacted into domestic law.	Individual access to UN complaints mechanisms.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	☒	None	None
ILO: Forced Labour Convention, 1930 (ILO 29),	✓	It has been enacted into industrial law.	Criminal sanctions and personal remedies

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Treaty	Aust a party	Domestic status	Domestic remedy for rights violations
ILO: Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO 87)	✓	It has been enacted into industrial law.	Criminal sanctions and personal remedies
ILO: Right to Organise and Collective Bargaining Convention, 1949 (ILO 98)	✓	It has been enacted into industrial law.	Criminal sanctions and personal remedies
ILO: Equal Remuneration Convention, 1951 (ILO 100)	✓	It has been enacted into industrial law.	Criminal sanctions and personal remedies
ILO: Abolition of Forced Labour Convention, 1957 (ILO 105)	✓	It has been enacted into industrial law.	Criminal sanctions and personal remedies
ILO: Discrimination (Employment and Occupation) Convention, 1958 (ILO 111)	✓	It has been enacted into industrial law. It is scheduled to the <i>Australian Human Rights Commission Act 1986</i> (Cth).	Personal remedies through court proceedings The Australian Human Rights Commission has power to investigate violations but has no enforceable remedial power. Common law entitlement to pursue personal remedies for denial of common law rights, eg right to fair trial. Australia is accountable through its reporting to the UN.
ILO: Minimum Age Convention, 1973 (ILO 138)	☒	There is some protection for under-age workers in domestic legislation.	Criminal sanctions

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Treaty	Aust a party	Domestic status	Domestic remedy for rights violations
ILO: Worst Forms of Child Labour Convention, 1999 (ILO 182)	✓	There is some protection for under-age workers in domestic legislation.	Criminal sanctions

9 Appendix E: Anti-discrimination law coverage in Australia

Laws	Personal attributes+														Areas of activity*												
	Race	Sex (incl pregnancy and breastfeeding)	Disability	Age	Carer, family or parent responsibilities	Marital status	Sexuality	Transsexuality	Lawful sexual activity	Religious belief	Political belief	Industrial activity	Criminal and I record	Medical records	Employment	Accommodation	Goods services facilities and premises	Education	Clubs or associations	Requests for information	Advertising	Government functions	Land and estates	Insurance and superannuation	Sexual harassment^	Victimisation	
RDA	✓														✓	✓	✓	✓	✓	☒	✓	✓	✓	✓	✓	✓	✓
SDA		✓			✓	✓									✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
DDA			✓												✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	^	✓	✓
ADA				✓											✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓
ACT	✓	✓	✓	✓	✓	✓	✓	✓	☒	✓	✓	✓	✓	☒	✓	✓	✓	✓	✓	✓	✓	☒	☒	✓	✓	✓	✓
NSW	✓#	✓	✓	✓	✓	✓	✓	✓	☒	☒#	☒	☒	☒	☒	✓	✓	✓	✓	✓	☒	✓	✓	✓	✓	✓	✓	✓
NT	✓	✓	✓	✓	✓	✓	✓	✓	☒	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	☒	✓	☒	☒	✓	✓	✓	✓
QLD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	☒	☒	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
SA	✓	✓	✓	✓	✓	✓	✓	✓	☒	✓~	☒	☒	☒	☒	✓	✓	✓	✓	✓	☒	✓	☒	✓	✓	✓	✓	✓
TAS	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	☒	✓	☒	✓	✓	✓^	✓	✓
VIC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	☒	☒	✓	✓	✓	✓	✓	☒	✓	☒	✓	✓	✓	✓	✓
WA	✓	✓	✓	✓	✓	✓	✓	✓	☒	✓	✓	☒	✓	☒	✓	✓	✓	✓	✓	☒	✓	☒	☒	✓	✓	✓	✓

+ Victoria also covers discrimination because of 'physical features'

*(1) some attributes are not grounds for discrimination in some areas of activity in some States and Territories; (2) Tasmania covers industrial agreements

^ the DDA covers disability harassment, and Tasmania covers harassment on the ground of a number of attributes

NSW covers discrimination because of 'ethno-religious' status under the definition of 'race'

~ SA covers discrimination only because of 'religious appearance or dress', but requires a person to reveal their face when the request to do so is reasonable in the circumstances

10 Appendix F: Anti-vilification law coverage in Australia

	Cwth	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Race	✓	✓+	✓+		✓+	✓-	✓	✓+	✓-
Religion					✓+		✓	✓+	
Disability							✓		
HIV/AIDS		✓+	✓+						
Homosexuality/sexual orientation/sexuality		✓+	✓+		✓+		✓		
Trans-sexuality/gender identity		✓+	✓+		✓+				

- ✓+ Unlawful conduct (the subject of complaint), and criminal conduct if serious
- ✓ Unlawful conduct only – the subject of complaint
- ✓- Criminal conduct only