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Volume 19
Number 4 *Symposium: Minority Rights*

Article 4

8-1-1997

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David Hodgkinson, *Protection of Minority Rights in Australia: The Present Legal Regime*, 19 Loy. L.A. Int'l & Comp. L. Rev. 857 (1997).

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Protection of Minority Rights in Australia: The Present Legal Regime

DAVID HODGKINSON*

I. INTRODUCTION

Australians are complacent about the protection of human rights In national and international fora we proclaim the satisfactory nature of our legal system in securing the rights of individuals. Occasionally we acknowledge that some groups, particularly the Australian Aborigines, may have legitimate complaints that the legal system does not go far enough in defending their rights But we believe that problems can be resolved by tinkering at the edges of an otherwise admirable human rights legal regime.¹

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1. Hilary Charlesworth, *The Australian Reluctance About Rights*, 31 OSGOODE HALL L.J. 196, 196 (1993). Charlesworth believes that such confidence is misplaced, and that the structure of human rights law in Australia is "haphazard and incomplete." *Id.* at 196. Further, Charlesworth argues that Australian human rights legislation is generally limited and that such legislation defers "to the pressures of federalism" by excluding state legislation from its scope. *Id.* at 213. For a discussion of the nature of the Australian federal system, see R.D. LUMB & G.A. MOENS, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED* 616 (5th ed. 1995). See also *Bradken Consol. Ltd. v. Broken Hill Proprietary Co., Ltd* (1979) 145 C.L.R. 107, 122-23 (1979); *Western Austl. v. Commonwealth* (1975) 134 C.L.R. 201, 222; *Victoria v. Commonwealth* (1971) 122 C.L.R. 353, 386, 395-97, available in LEXIS, Aust. Library, Highct file; *Queen v. Phillips* (1970) 125 C.L.R. 93, 116; *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31; *Amalgamated Soc. of Engineers v. Adelaide Steamship Co., Ltd.* (1920) 28 C.L.R. 129, 141-155; *CONSTITUTIONAL COMMISSION, FINAL REPORT OF THE CONSTITUTIONAL COMMISSION* 53-55 (1988); BRIAN GALLIGAN, *A FEDERAL REPUBLIC: AUSTRALIA'S CONSTITUTIONAL SYSTEM OF GOVERNMENT* (1995); P.H. LANE, *A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW* 3-39 (6th ed. 1995); P.H. LANE, *AN INTRODUCTION TO THE AUSTRALIAN CONSTITUTIONS* 188-224 (6th ed. 1994); R.D. LUMB, *THE CONSTITUTIONS OF THE AUSTRALIAN STATES* (5th ed. 1991); David Meale, *The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal*,

Australia has not given a great deal of attention to the issue of protecting minority rights.² This may be due, in part, to the fact that, until recently, most Australians were classified as people of either English, Scottish, Irish or Welsh descent.³ Additionally, Australia's indigenous population only comprises one percent of the total population.⁴ This population mix, however, is changing. Due to the gradual demise of a "white Australia" immigration policy,⁵ forty percent of current settlers are now from Asia.⁶ Australia is becoming a more multicultural society.⁷

Nonetheless, Australia does not have a legal regime to protect minority rights. Although the human rights legal regime protects some individual rights, it does not protect minority groups. Australia may then need to develop a more specific minority rights protection scheme, especially in light of changing racial demographics. Whether such protections are likely to develop, however, is unclear.

Part II of this Article discusses the Australian Constitution's express and implied rights and then examines proposals for an express Bill of Rights. Part III examines legislative protections of minority rights in general. Part IV specifically discusses the rights of Aborigines. This Article concludes by questioning whether the

8 AUST. J. L. SOC. 25, 55-58 (1992).

2. To simplify the explanation of general minority protection in Australia, this Article uses the term "minority" to refer those that are part of an ethnic, racial or religious group that is marginally represented in the Australian population, regardless of specific characteristics. Accordingly, this Article does not consider the legal protection of the rights of women, children, and the elderly. For a detailed discussion of the nature and characterization of minorities, see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 987-88 (1996); Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 111-12 (1976); Justice J. Mathews, *Protection of Minorities and Equal Opportunities*, 11 UNSW L. J. 1 (1988); *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64, at 25 (Apr. 6) (analyzing whether minorities may ever obtain "equal" rights).

3. See Patrick Parkinson, *Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities*, 16 SYDNEY L. REV. 473, 473 (1994).

4. See *id.*

5. See Immigration Restriction Act, 1901 (Cth) (requiring immigrants to take a dictation test in a European language); Pacific Island Labourers Act, 1901 (Cth) (providing for the deportation of all Pacific Islanders by 1905).

6. See BUREAU OF IMMIGRATION RESEARCH, SETTLER ARRIVALS 1989-90 (1991). The Asian community, particularly the Southeast Asian community, is growing quickly in Australia.

7. See GRETA BIRD, *THE PROCESS OF LAW IN AUSTRALIA: INTERCULTURAL PERSPECTIVES* (2d ed. 1993).

Australian Parliament will enact minority rights legislation.

II. CONSTITUTIONAL RIGHTS

A. Express Rights

Clause 9 of Australia's Constitution Act⁸ provides for four specific individual rights: the right to freedom of religion,⁹ the rights of residents in the States,¹⁰ the right to have just terms paid for Commonwealth acquisitions of property,¹¹ and the right to a jury trial.¹²

There is no traditional statement of rights or an express bill of rights in the Constitution.¹³ Rather, the Constitution is primarily concerned with establishing a general system of government.¹⁴ Accordingly, it makes no express reference to general rights and freedoms and, therefore, is silent regarding minority rights.¹⁵ Of the four individual freedoms, only the freedom of religion affects minorities as a group and even then, only tangentially. Section 116 of Australia's Constitution provides that "[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualifica-

8. Commonwealth of Australia Constitution Act, *reprinted in* R.D. LUMB & G.A. MOENS, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED* 616 (5th ed. 1995).

9. *See id.* ch. V, § 116.

10. *See id.* ch. V, § 117.

11. *See id.* ch. I, § 51(xxxi).

12. *See id.* ch. III, § 80.

13. The Constitution does contain certain "democratic rights" concerning Commonwealth elections. *See id.* ch. I, pt. II, § 8, pt. III, §§ 24, 30; *see also* MURRAY R. WILCOX, *AN AUSTRALIAN CHARTER OF RIGHTS?* 194 (1993).

14. *See* LUMB & MOENS, *supra* note 1.

15. It may, however, be possible to argue that some sections in the Constitution "protect individual rights by restricting government power." *See* AUSTL. CONST. ch. I, pt. III, §§ 24-25. These sections deal with equality of voting rights, guarantees against discrimination with respect to Commonwealth taxes and bounties, guarantees against being subjected to the demands of valid but inconsistent laws on the same subject matter, and full faith and credit provisions. *See id.*; *see also* *Street v. Queensland Bar Ass'n* (1989) 168 C.L.R. 461, 522-23 (discussing courts' tendencies to "distort the content of some . . . constitutional guaranties by restrictive legalism or by recourse to artificial formalism," thereby failing to create actual rights that appear to be individual rights).

tion for any office or public trust under the Commonwealth."¹⁶

"There is nothing . . . which inhibits or is capable of inhibiting the power of the Parliament of the *State* to make laws . . . which affect the freedom of religious worship and religious expression."¹⁷ It is clear that, while any Commonwealth legislation that violates section 116's prohibition would be invalid,¹⁸ this provision only applies to the Commonwealth and not to the States.¹⁹ Thus, section 116 protects individuals from Commonwealth laws prescribing or proscribing religion, and thereby indirectly affords some protection to religious minorities.²⁰

B. Implied Rights

1. Freedom of Political Discussion

The High Court recently held that the Constitution contains implied fundamental rights and freedoms, which override common law as well as Commonwealth and state statutes. Political discussion is one such implied freedom. In *Australian Capital Television Pty., Ltd. v. Commonwealth*²¹ and in *Nationwide News Pty., Ltd. v.*

16. AUSTL. CONST. ch. V, § 116.

17. *Grace Bible Church v. Reedman* (1984) 36 S.A. St. R. 376 (emphasis added). Section 116's prohibition, however, appears to apply Commonwealth legislation under § 122 relating to the Territories. See *Lamshed v. Lake* (1959) 99 C.L.R. 131, 142-43.

18. See *Adelaide Co. of Jehovah's Witnesses v. Commonwealth* (1943) 67 C.L.R. 11, 123.

19. See G. De Q. Walker, *Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion*, 59 AUSTL. L.J. 276, 277 (1985) (citing *Grace Bible Church v. Reedman* (1984) 36 S.A. St. R. 376).

20. Given the operation of section 116 as a restraint upon the Commonwealth Parliament's exercise of legislative power, does the section also operate to restrain executive acts of the Commonwealth Government? In *Attorney-General (Vic.) Ex Rel Black v. Commonwealth* (1981) 146 C.L.R. 559, 581, Chief Justice Barwick stated that if administration comes "within the ambit of the authority conferred by the statute, and does amount to the establishment of a religion, the statute that supports it will most probably be a statute for establishing a religion and therefore void as offending section 116." *Id.* Further, in *Minister for Immigration and Ethnic Affairs v. Lebanese Moslem Ass'n*, Justice Jackson stated that "the true situation is that if an enactment permitted executive action under it which amounted to a prohibition upon the free exercise of any religion, the enactment to the extent that it permitted such action . . . would be invalid." *Minister for Immigration and Ethnic Affairs v. Lebanese Moslem Ass'n* (1987) 71 A.L.R. 578, 584.

21. (1992) 177 C.L.R. 106.

Wills,²² the High Court held the Constitution implies a commitment to freedom of political discussion. In both cases, Justices Deane, Toohey and Gaudron found that the underlying constitutional principles of "representative government" or "representative parliamentary democracy" implied a right to freedom of political discussion.²³ Thus, the High Court established the right to political discussion between elected officials and electors.²⁴

In *Theophanous v. Herald & Weekly Times, Ltd.*,²⁵ the High Court extended the implied freedom of political discussion to include a right to publish and discuss politicians' conduct and their fitness to hold public office.²⁶ The High Court held that the freedom of political discussion would not only invalidate Commonwealth legislation that unreasonably impaired the freedom, but would also impose a similar limit on the law of defamation.²⁷

2. The Principle of Equality

In *Leeth v. Commonwealth*,²⁸ Justices Deane and Toohey concluded that protection of the "underlying equality of all persons under the law" could be implied in the Constitution. They stated:

The common law may discriminate between individuals by reference to relevant differences and distinctions, such as infancy or incapacity, or by reason of conduct which it proscribes, punishes or penalizes. It may have failed adequately to acknowledge or address the fact that, in some circumstances, theoretical equality under the law sustains rather than alleviates the practical reality of social and economic inequality. Nonetheless . . . the essential or underlying theoretical equality of all persons

22. (1992) 177 C.L.R. 1.

23. See *id.* at 2-3, 70, 94; *Australian Capital* (1992) 177 C.L.R. 106, 168, 209-12. In their dissents, however, Chief Justice Mason and Justices Brennan, Dawson and McHugh relied on the absence of an express provision guaranteeing the freedom of political discussion. See *Nationwide News* (1992) 177 C.L.R. 1, 34, 50, 88, 91, 101, 103; *Australian Capital* (1992) 177 C.L.R. 106 135, 142, 182, 184-86, 246.

24. See *Nationwide News* (1992) 177 C.L.R. 1, 2-3, 43-44, 69-70, 94; *Australian Capital* (1992) 177 C.L.R. 106, 138-42, 184, 227-32, 229-32.

25. (1994) 182 C.L.R.104.

26. See *id.* at 121-22.

27. See *id.* at 122.

28. (1992) 174 C.L.R. 455.

under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government. Conformably with its ordinary approach to fundamental principles, the Constitution does not spell out that general doctrine of legal equality in express words. The question arises whether it adopts it as a matter of necessary implication. In our view, several considerations combine to dictate an affirmative answer to that question.²⁹

Thus, although two High Court justices have found that all people are equal under the law, this principle may not always benefit minorities.³⁰

It is clear that the Constitution contains little express or even implied individual protections, let alone minority, protections. The few rights that are available are either inapplicable to minority groups, are severely limited in scope or may, in some situations, work against minorities.

C. *A Bill of Rights?*

The Australian Constitution does not contain either a Bill of Rights or a traditional statement of rights.³¹ Proposed constitutional amendments to add a Bill of Rights, attempts to enact a statutory Bill of Rights, or attempts to create an enumerated list of specific rights have all been unsuccessful.³² Scholar James Thompson has argued that "propelled by the realization that there may well not be constitutional amendments adding a comprehensive Bill of Rights . . . this perspective endeavors to read the Constitution's words, structures, silences and implications in the most

29. *Id.* at 485-86.

30. *See id.*

31. For a general discussion of Australia's need for a Bill of Rights, see LESLIE ZINES, *CONSTITUTIONAL CHANGE IN THE COMMONWEALTH* 33-73 (1991); Peter Bailey, *Australia—How Are You Going, Mate, Without a Bill of Rights? Or Righting the Constitution*, 5 *CANTERBURY L. REV.* 251 (1993); Peter Bayne, *The Protection of Rights—An Intersection of Judicial, Legislative and Executive Action*, 66 *AUST. L.J.* 844 (1992); Brian Galligan, *A Bill of Rights for Australia?*, 17 *INTERGOV'T PERSP.* 53 (1991); Geoffrey Kennett, *Individual Rights, the High Court and the Constitution*, 19 *MELB. U.L. REV.* 581 (1994).

32. *See* CONSTITUTIONAL COMMISSION, *supra* note 1, at 456; THE CONSTITUTIONAL COMMISSION AND THE 1988 REFERENDUMS (Brian Galligan & J. Nethercote eds., 1989); GEOFFREY SAWER, *AUSTRALIAN FEDERAL POLITICS AND LAW* 171-73 (1963).

rights oriented way possible.”³³

There are continuing calls for an Australian Bill of Rights. For example, the Law Council of Australia Working Group proposed an Australian Charter of Rights and Freedoms, which enumerates such rights as the freedom of thought and religion, the right to equality under the law, and freedom of expression.³⁴ Proponents argue that “certain fundamental rights and freedoms are essential to the dignity of the human person and that all nations and states have particular characteristics that tend to result in the emphasis of particular rights and freedoms over others.”³⁵

Other critics further this argument by advocating to protect minority rights. One such proponent is the Constitutional Commission. In its Final Report of 1988, the Commission recommended a new chapter to the Constitution entitled “Rights and Freedoms,” which would provide “the right to freedom from discrimination on the ground of race, color, ethnic or national origin, sex, marital status, or political, religious or ethical belief.”³⁶ Such an amendment would undoubtedly provide minority groups with legal protection against discrimination.

33. James A. Thomson, *An Australian Bill of Rights: Glorious Promises, Concealed Dangers*, 19 MELB. U. L. REV. 1020, 1055 (1994). Adherents of this perspective include Justices Deane, Toohey and Gaudron. See generally *Australian Capital Television Pty. v. Commonwealth* (1992) 177 C.L.R. 106; *Polyukhovich v. Commonwealth* (1992) 172 C.L.R. 501; *Leeth v. Commonwealth* (1992) 174 C.L.R. 455; *Nationwide News Pty v. Wills* (1992) 177 C.L.R. 1; *Lim v. Minister for Immigration* (1992) 176 CLR 1. Less consistent supporters of this perspective include former Chief Justice Mason and Chief Justice Brennan. See also *Australian Capital Television Pty. v. Commonwealth* (1992) 177 C.L.R. 106, 123-47; Sir Gerard Brennan, *The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response*, in TOWARDS AN AUSTRALIAN BILL OF RIGHTS 199 (1994).

34. See LAW COUNCIL OF AUSTRALIA, AUSTRALIAN CHARTER OF RIGHTS AND FREEDOMS 1 (1994).

35. See *id.* The Charter's provisions principally stem from three international treaties that Australia has ratified: Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360. Other Charter provisions are combinations of sections taken from the Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act of 1990.

36. CONSTITUTIONAL COMMISSION, *supra* note 1, at 21.

III. LEGISLATION

Although the common law affords some protection of individual or minority rights in Australia,³⁷ it has traditionally regarded minority freedoms as "residual and has provided for their protection only indirectly."³⁸ Given also the relative weakness of individual or minority rights in the Constitution, one must look to legislation enacted by the Commonwealth and State parliaments to find such protections.³⁹

Primarily through human rights, the Commonwealth has also indirectly provided some minority rights. The Commonwealth Parliament has passed legislation implementing a number of major international human rights treaties.⁴⁰ The relevant acts of the

37. See P. Durack & R. Wilson, *Do We Need a New Constitution for the Commonwealth?*, 41 AUST. L.J. 231, 242 (1967).

38. Charlesworth, *supra* note 1, at 201. Charlesworth also notes that such indirect protection "has been done chiefly through developing institutional principles such as the rule of law and the independence of the judiciary, procedural guarantees such as those found in administrative law, and principles of statutory interpretation." *Id.* at 201-02. For a discussion on whether the judiciary is prepared to consider the consequences for human rights of specific decisions, see *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1, 214-16; *Dietrich v. Queen* (1992) 177 C.L.R. 292; *Davis v. Commonwealth* (1988) 166 C.L.R. 79, 116; BETH GAZE & MELINDA JONES, *LAW LIBERTY AND AUSTRALIAN DEMOCRACY* 30-32 (1990).

39. See Mathews, *supra* note 2, at 2-4.

40. It is well settled that, as a general proposition under the common law, entry by the Executive into a convention or treaty is insufficient to modify the Australian domestic legal order by creating or changing public and private legal rights and obligations, without legislation to implement it. See *Victoria v. Commonwealth* (1994) 138 A.L.R. 129, 142; *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 286-87; *Commonwealth v. Tasmania (Tasmanian Dam Case)* (1983) 158 C.L.R. 1, 5; *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 253; *Simsek v. MacPhee* (1982) 148 C.L.R. 636, 641-42; *Bradley v. Commonwealth* (1973) 128 C.L.R. 557, 582; *Chow Hung Ching v. King* (1948) 77 C.L.R. 449, 478; *Brown v. Lizars* (1905) 2 C.L.R. 837, 851, 860. In *Victoria*, the Court stated:

The conduct of external affairs by the Executive may produce agreements which the Executive wishes to translate into the domestic or municipal legal order. To do so, it must procure the passage of legislation implementing those agreements if it wishes to create individual rights and obligations or change existing rights and obligations under that legal order Where . . . the Executive ratifies a Convention which calls for action affecting powers and relationships governed by the domestic legal order, legislation is needed to implement the Convention. The question then arises whether the law is supported by the legislative power with respect to external affairs. The spare text of § 51(xxix) must be construed to ascertain its scope.

Victoria v. Commonwealth 138 A.L.R. 129, 142-43.

Commonwealth Parliament include: the Racial Discrimination Act 1975;⁴¹ The Human Rights Commission Act 1981;⁴² The Human Rights and Equal Opportunity Commission Act 1986;⁴³ The Privacy Act 1988;⁴⁴ The Crimes (Torture) Act 1988;⁴⁵ The Disability Discrimination Act 1993;⁴⁶ and The Racial Hatred Act 1995.⁴⁷ The Australian States also enacted specific anti-discrimination legislation consistent with the aims of the international conventions, outlined above.⁴⁸

41. Racial Discrimination Act, 1981 (implementing the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195).

42. Human Rights Commission Act, 1981 (implementing the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448; Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (1971); Declaration on the Rights of Disabled Persons, G.A. Res. 3447(XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1975); ILO Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31; and United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/55 (1981)). Article 26 of the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, prohibit discrimination on the grounds of race and national origin. International Covenant on Civil and Political Rights, art. 26, 999 U.N.T.S. at 179; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. Article 27 of the International Covenant on Civil and Political Rights provides for the freedom of particular groups to enjoy their culture or religion. International Covenant on Civil and Political Rights, art. 27, 999 U.N.T.S. at 179. Legislation such as the Human Rights Commission Act 1981 and the Racial Discrimination Act 1975 give effect to these international obligations in domestic and municipal law. See Racial Discrimination Act, 1975, schedule; Human Rights Commission Act, 1981, schedule; see also Parkinson, *supra* note 3, at 475.

43. Human Rights and Equal Opportunity Commission Act, 1986.

44. Privacy Act, 1988 (implementing the International Covenant on Civil and Political Rights, art. 26, 999 U.N.T.S. at 179, and the Organization for Economic Cooperation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Sept. 23, 1980, 20 I.L.M. 422).

45. Crimes (Torture) Act, 1988 (implementing the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72, Annex (1984)).

46. Disability Discrimination Act, 1993 (implementing the Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (1971), and the Declaration on the Rights of Disabled Persons, G.A. Res. 3447(XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1975)).

47. Racial Hatred Act, 1995. For several criticisms of Australian human rights legislation, see Charlesworth, *supra* note 1, at 213-18.

48. See, e.g., Discrimination Act 1991 (AUSTL. CAP. TERR. LAWS); Anti-

When the Racial Discrimination Bill was introduced in 1973, the Attorney-General, Senator Lionel Murphy,⁴⁹ stated that it "proclaims the equality and essential dignity of all human beings that is the foundation of all instruments relating to human rights."⁵⁰ Consistent with the International Convention on the Elimination of All Forms of Racial Discrimination, section 9 of the Racial Discrimination Act provides that "race" includes color, descent, national or ethnic origin.⁵¹ This broad definition ensures that the Act covers more than "race" alone. Section 9(1) provides:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.⁵²

Further, section 10(1) provides:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that

Discrimination Act 1977, No. 48 (N.S.W.).

49. Senator Murphy was subsequently appointed to the High Court in 1975, and died in office in 1986. He was a leading proponent of reading the Constitution's words, structures, silences and implications in the most rights-oriented way possible. See John Goldring, *Murphy and the Constitution*, in LIONEL MURPHY: A RADICAL JUDGE 60, 65-66 (1987).

50. Bailey, *supra* note 31, at 181.

51. Racial Discrimination Act § 9, 1975.

52. *Id.* at § 9(1) (emphasis added). Section 9(2) provides that "[a] reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention." *Id.* at § 9(2). Section 9(4) states that "[t]he succeeding provisions of section 9 do not limit the generality of this section." *Id.* § 9(4). Prior to the enactment of the Act, there was some debate as to its scope and validity. In *Koowarata v. Bjelke*, the High Court upheld the validity of the Racial Discrimination Act. (1982) 153 C.L.R. 168.

other race, colour or national or ethnic origin.⁵³

Sections 11 through 17 of the Racial Discrimination Act prohibit racial discrimination in the following situations: access to places and facilities;⁵⁴ land, housing and other accommodations;⁵⁵ goods and services;⁵⁶ trade unions;⁵⁷ and in seeking and maintaining employment.⁵⁸ Under the Act, it is also unlawful to advertise in a way that intends to discriminate based on race,⁵⁹ or that incite unlawful actions.⁶⁰

The Racial Hatred Act of 1995⁶¹ amends the Racial Discrimination Act 1975⁶² by inserting a new section entitled "Offensive Behaviour Because of Race, Colour or National or Ethnic Origin," which provides:

It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.⁶³

53. Racial Discrimination Act § 10(1), 1975. Section 10(2) provides: "A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention." *Id.* at § 10(2). For a discussion of the use or operation of § 10, see *Mabo v. Queensland* (1988) 166 C.L.R. 186; *Mabo v. Queensland (No 2)* (1992) 175 C.L.R. 1, 214-16; *Western Australia v. The Commonwealth (Native Title Act Case)* (1995) 183 C.L.R. 373.

54. *See* Racial Discrimination Act § 11, 1975.

55. *See id.* § 12.

56. *See id.* § 13.

57. *See id.* § 14.

58. *See id.* § 15.

59. *See id.* § 16.

60. *See id.* § 17.

61. The Racial Hatred Act, 1995. The Racial Hatred Act's preamble prohibits "certain conduct involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin," and for related purposes. *Id.* pmbl. The Act does not exclude or limit the concurrent operation of any law of a State or Territory. *See* Charlesworth, *supra* note 1, at 213.

62. Racial Discrimination Act, 1975.

63. *Id.* § 18(C)(1) (as amended by the Racial Hatred Act, 1995). The new amendment makes the enumerated acts unlawful. Section 22 of the Racial Discrimination Act allows people to make complaints to the Human Rights and Equal Opportunity Commission concerning unlawful acts. *See id.* § 22 (as amended by the Racial Hatred Act, 1995).

When introducing the Racial Hatred Bill in 1994, the Attorney-General Michael Lavarch stated:

The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.⁶⁴

The amended Racial Discrimination Act, and the various other State Acts, prohibit discrimination throughout Australia, on the basis of color, nationality, ethnic or national origin. Thus, through State legislation, minorities are legally protected from some forms of discrimination. These protections are, however, only general in nature.

IV. ABORIGINES

A. Overview

In the 200 years after the British Crown acquired sovereignty over Australia, the treatment of Aborigines has been marked by violence and deprivation.⁶⁵ Until 1967, the Constitution expressly

Note, however, that an unlawful act is not necessarily a criminal offense. Section 26 provides that it is not an offense to do an act that is unlawful under Part IIA, unless Part I (Offenses) expressly says that the act is an offense. *Id.* § 26 (as amended by the Racial Hatred Act, 1995). Further, § 18(D) provides a number of exemptions to § 18(C)(1):

Anything said or done reasonably and in good faith (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in making or publishing (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment, is not rendered unlawful by or through § 18(C).

See id. at § 18(D) (as amended by the Racial Hatred Act, 1995).

64. House of Representatives, Weekly Hansard, 37th Parliament, First Session, Fifth Period 3336 (1994). Lavarch also indicated that “[w]e are fortunate in that Australia has a significant degree of social cohesion and racial harmony. This bill is an appropriate and measured response to closing the identified gap in the legal protection of all Australians from extreme racist behaviour.” *Id.* at 3342.

65. Aborigines suffer worse hardships and deprivations than any other racial group in this country. Their problems encompass a full range of life experiences They include: gross health problems, with the highest infant mortality rate in the western world and almost general eye, ear and lung infections; widespread poverty, with substandard housing and living conditions; educational under-achievement; high unemployment (well

provided that aboriginal natives were not to be counted in tabulating the population of the Commonwealth or a State. This provision was deleted following a constitutional referendum, the Constitution Alteration (Aboriginals) Act of 1967.⁶⁶

In Australia, Aborigines continue to suffer. Bailey notes that the continuing political, economic and social problems facing Aborigines result from both their indigenous indentity and their minority status.⁶⁷ Only recently has Australia addressed the issues of aboriginal customary law and aboriginal relationships with the land and proposed some solutions. These issues are discussed below.

B. Native Title

In 1992, in *Mabo v. Queensland (No. 2)*,⁶⁸ the High Court held that a group of Torres Strait Islanders were entitled to possess, occupy, use and enjoy certain lands in the Murray Islands against the whole world.⁶⁹ The Court concluded that Australian common law recognizes a form of native title⁷⁰ reflecting the indigenous inhabitants' entitlement to their traditional lands. Justice Brennan stated:

Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radi-

over 50% in some areas); gross over-representation amongst the prison population and defendants in criminal courts, particularly in relation to minor, "street" offences.

See Mathews, *supra* note 2, at 20; see also Bailey, *supra* note 31, at 192-93; Garth Netheim, *Indigenous Rights, Human Rights, and Australia*, 61 AUST. L.J. 291 (1987).

66. Constitution Alteration (Aboriginals) Act, 1967.

67. See Bailey, *supra* note 31, at 192.

68. (1992) 175 C.L.R. 1.

69. See *id.* at 216.

70. Justice Brennan indicated:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

Id. at 58. For a discussion of native title, see generally MABO: THE NATIVE TITLE LEGISLATION (M.A. Stephenson ed., 1995); NATIVE TITLE LEGISLATION IN AUSTRALIA (R.H. Bartlett & G.D. Meyers eds., 1994); RESOURCE DEVELOPMENT AND ABORIGINAL LAND RIGHTS IN AUSTRALIA (R.H. Bartlett ed., 1993). Gary D. Meyers, *Implementing Native Title in Australia: The Implications for Living Resources Management*, 14 U. TAS. L. REV. 1 (1995).

cal title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.⁷¹

In response to the *Mabo* decision, the Commonwealth Parliament passed the Native Title Act 1993.⁷² This Act seeks to establish a legal regime that respects and protects native title rights recognized by Australian common law. In addition, it validates past acts, which may have been invalidated by the existence of native title.⁷³ Finally, it establishes native title rights and compensates native title holders for any impairment of native title on "just terms," whether caused by the act of validation or by future interests granted over the land.⁷⁴

In 1994, Western Australia unsuccessfully challenged the validity of the Native Title Act 1993 in the High Court.⁷⁵ The Court held that the 1993 Native Title Act was substantially valid in Western Australia and against Western Australia's own native title legislation.⁷⁶

While the Commonwealth Parliament has enacted legislation that recognizes native title rights, other legislative enactments that

71. *Mabo (No. 2)* 175 C.L.R. at 69.

72. Native Title Act, 1993.

73. *See id.* §§ 3(d), 14.

74. *See id.* § 3.

75. *See* *Western Australia v. Commonwealth (Native Title Act Case)* (1995) 183 C.L.R. 373. The Court found Western Australia's own native title legislation, the Land (Titles and Traditional Usage) Act, to be wholly inoperative due to its inconsistency with both the Racial Discrimination Act 1975 and the Native Title Act 1993. *See id.* at 375. Further, the Court found the Land (Titles and Traditional Usage) Act to be inconsistent with § 10(1) of the Racial Discrimination Act and was invalid to the extent of the inconsistency because of § 109 of Australia's Constitution. *See id.* Section 109 provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid." AUSTL. CONST. ch. V, § 109. In a subsequent decision on December 23, 1996, the High Court held that pastoral leases do not necessarily extinguish native title, rather that native title rights are only extinguished where they are inconsistent with pastoral rights. *See Wik Peoples v. State of Queensland* (1996) 71 A.L.J.R. 173. In *Wik Peoples*, Justice Toohey said that "[I]nconsistency . . . renders the native title rights unenforceable at law and, in that sense, extinguished. If the two can co-exist, no question of implicit extinguishment arises." *Id.* at 211. The determination of particular native title rights must be consistent with particular, individual circumstances. Discussion and commentary following this decision have generally focused on the possibility of some Commonwealth Government amendment to the Native Title Act 1993 and to the Racial Discrimination Act 1975.

76. *See* *Native Title Act Case* 183 C.L.R. at 373.

provide for the protection of indigenous Australian rights are non-existent. Because of their minority status, much of Australia's minority population continues to face serious political, economic and social problems.

V. LAW REFORM AND CONCLUSION

Most Australians are relatively complacent about protecting minority rights. Recent judicial recognition of native title rights may reinforce this complacency.⁷⁷ As such, there have been few demands to reform the law to further protect the rights of individuals and minorities, although the Constitutional Commission and the Law Council of Australia continue to propose an Australian Bill of Rights.

This Article provides a brief survey of the present ways in which the Australian legal system protects the rights of minority groups. This review illustrates that although the human rights legal regime affords some protection of individuals, there is no specific protection of the rights of minority groups, with the exception of native title right protections for Aborigines. Notwithstanding the changing composition and population mix of Australian society, the question remains whether the Commonwealth and the State parliaments have the necessary and continuing political will to pass more comprehensive legislation specifically protecting and extending the rights of Australian minorities.

77. Such recognition, however, also caused concern regarding native title rights. This has resulted in a discussion to amend either or both the 1993 Native Title Act and the Racial Discrimination Act 1975 to provide for legislative extinguishment of native title on pastoral leases. See Mathews, *supra* note 2, at 20.

