

TAKING PARLIAMENTARY SOVEREIGNTY SERIOUSLY WITHIN A BILL OF RIGHTS FRAMEWORK

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[The Victorian Government has made a commitment to consult with the community on how best to protect and promote human rights in Victoria. To this end, it has established a Human Rights Consultation Committee to undertake this consultation and to report on the desirability or otherwise of enacting a Bill of Rights. The government has, however, indicated its preference for a statutory Bill of Rights and one that preserves the 'sovereignty of Parliament'. This article takes those two government preferences as its baseline and then explores what might follow if the preservation of parliamentary sovereignty is taken seriously within a Victorian rights framework.]

I INTRODUCTION

In May 2005, the Victorian Government published a Statement of Intent on Human Rights.¹ Its purpose was to begin a rights dialogue with the Victorian community and to outline the government's preferred model for rights protection. At the same time, the Human Rights Consultation Committee was established with the mandate to consult widely in the community on how best to protect and promote human rights in Victoria. It is asked to report by 30 November 2005 with recommendations

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¹ Victorian Government, *Statement of Intent: Human Rights in Victoria (May 2004)*, available at <<http://www.justice.vic.gov.au/humanrights>> (last visited Aug. 2 2005).

on a suitable rights framework “based on the preferences expressed in [the] Statement of Intent and the views of the Victorian community expressed in the submissions that it receives and in subsequent consultations that it may undertake.”²

The Statement of Intent makes clear, however, that the government favours a statutory Bill of Rights of the kind operating in New Zealand, the United Kingdom and the Australian Capital Territory. These models enshrine a range of civil and political rights in an ordinary statute³ and when a new law is introduced into the Parliament, the government must certify its compatibility or otherwise with the Bill of Rights.⁴ In addition, the courts have an important but limited role in the protection of rights. They can make a declaration of a law’s incompatibility with the Bill of Rights but have no power to invalidate it on this ground.⁵

This article will take the above characteristics of the government’s preferred model as a baseline then explore more fully what may follow from that part of the Statement of Intent which states that “[t]he Government is concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights.”⁶ It is my argument that if parliamentary sovereignty⁷ is taken seriously within a rights framework then a statutory (Victorian) Bill of Rights might include the following:

- A rigorous system of pre-legislative scrutiny to include an expert, independent public body and sometimes the courts *in addition to* that undertaken by the Parliament and the Executive.

² *Id.*

³ Part III of the Human Rights Act, 2004 (ACT), for example, contains most of the rights found in the INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS. They include the right to life, liberty and security of the person; the freedom of movement, thought, conscience, religion, belief, expression and association; and the protection of family and children and from torture, cruel, inhuman or degrading treatment.

⁴ See Human Rights Act, 2004, s 37 (ACT); Human Rights Act, 1998, s 19 (UK); *Cf* New Zealand Bill of Rights Act, 1990, s 7 (NZ) where the Attorney General need only alert the Parliament when a Bill appears to be inconsistent with a protected right or freedom.

⁵ See Human Rights Act, 2004, s 32 (ACT); Human Rights Act, 1998, s 4 (UK); *Cf* New Zealand where the New Zealand Bill of Rights Act, 1990, (NZ) does not provide Courts with the power to make a declaration of incompatibility. But in *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9 (NZ, High Court of New Zealand) the New Zealand High Court held that when a law is found to be inconsistent with the New Zealand Bill of Rights Act, 1990, (NZ) they can make a declaration of inconsistency. For a critique of the *Moonen* decision see James Allan, *Take Heed Australia – A Statutory Bill of Rights and its Inflationary Effect*, 6 DEAKIN L. REV. 322, 327-333 (2001).

⁶ STATEMENT OF INTENT, *supra* note 1.

⁷ I shall use the phrase parliamentary sovereignty in the remainder of the article for the sake of consistency with the terminology used in the Statement of Intent. But note that term parliamentary sovereignty in its strong, Diceyan sense is inappropriate in the Australian context where the Australian Constitution creates a federal system that divides legislative, executive and judicial power between two levels of government, State and Commonwealth. Moreover, it established a final court of appeal – the High Court – with the power to invalidate legislative and executive action that offends the Constitution. See *contra* note 47 and accompanying text for Dicey’s definition of parliamentary sovereignty.

- The power of judicial review of delegated legislation when incompatible with the Bill of Rights.
- The application of the Bill of Rights to all public bodies and to any person or body that performs a public function, power or duty.
- The express recognition that a remedy lies against a person or body to whom the Bill of Rights applies for the exercise of a public function, power or duty in a manner which offends a protected right(s).

II STRENGTHENING THE SYSTEM OF PRE-LEGISLATIVE SCRUTINY

The Bills of Rights in New Zealand, the United Kingdom and the Australian Capital Territory include a number of mechanisms that provide for meaningful pre-legislative scrutiny by the parliament and the executive. These include the establishment of parliamentary committees to assess the rights impact of proposed laws and the duty to report their findings to the Parliament.⁸ And the introduction of a law into the Parliament must be accompanied by a statement, made either by the Attorney-General or relevant Minister, as to its compatibility or otherwise with the Bill of Rights.⁹

However a rights framework in which parliamentary sovereignty is taken seriously may also glean something of value from the organising principle of the post-revolutionary French Constitution. And that is a distinct conception of the separation of powers doctrine where the judicial function is subordinated to that of the parliament and the executive. This emerged due to “[t]he ideology of the revolution [which] was...distinctly anti-judicial”¹⁰ and was founded upon that “aspect of the [Rousseau] tradition which excludes review of constitutionality by the courts; the law (statutes), as the expression of the general will, is virtually equal to the constitution, and the courts can have no authority to strike it down.”¹¹

The Constitution of 1958 did, however, establish the *Conseil Constitutionnel* (Constitutional Council).¹² Its primary role is to assess the constitutionality of laws

⁸ For example, s 38 of the of the Human Rights Act, 2004 (ACT) provides that “[t]he relevant standing committee [of the Legislative Assembly] must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.” A similar procedure for pre-legislative scrutiny operates in the UK where the Joint Parliamentary Committee on Human Rights reports to the Parliament on its assessment of whether proposed laws are compatible with the Human Rights Act, 1998, (UK)

⁹ See *supra* note 4.

¹⁰ Richard J. Cummins, *The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France*, 35 INT’L & COMP. L.Q. 594, 599 (1986).

¹¹ *Id.*

¹² Constitution of 4 Oct. 1958, arts. 56-63 (France).

before they are enacted. It must do so within one month or eight days upon a request from the government if the matter is urgent.¹³ A declaration of unconstitutionality prevents the passage of the law.¹⁴ But once a law is formally enacted the Constitutional Council has no power to strike it down. In this way, the organising constitutional principle of post-revolutionary France – “the untouchability of the statute as the manifestation of the general will”¹⁵ – is honoured and maintained.

It is my argument that if parliamentary sovereignty is taken seriously within the government’s preferred rights framework then rights scrutiny by a judicial body ought to occur *before* a law is enacted, in addition to that undertaken by the parliament and the executive under the New Zealand, the United Kingdom and ACT models.¹⁶ In a Victorian Bill of Rights this could be a two-step process. First, a body sufficiently independent parliament and the government, the Equal Opportunity Commission (“EOC”) for example, would assess the compatibility of proposed laws against the Bill of Rights. Second, and in the event the EOC considers the proposed law incompatible, they would refer the matter to the Court of Appeal of the Victorian Supreme Court for an advisory opinion.¹⁷ As with the French Constitutional Council, the Court of Appeal would have to do so within a month or earlier if the circumstances were urgent or exceptional. In the event the Court of Appeal finds the proposed law incompatible with the Bill of Rights the government *can* still proceed with its passage if it wishes to do so.¹⁸ But this can only be done *after* the Attorney-General has made a statement of rights compatibility (or otherwise) to the Parliament which must include its response to the Court of Appeal’s advisory opinion. In this kind of model it would, however, be perfectly reasonable for the Attorney-General to still make a compatibility statement based on a reasoned, articulated but different conception of the legislative effect on the relevant right.¹⁹

For as Jeremy Waldron notes, matters of right “are complex and controversial [and] the existence of good faith disagreement is undeniable.”²⁰ When the scope and

¹³ Constitution of 4 Oct. 1958, art. 61 (France).

¹⁴ Constitution of 4 Oct. 1958, art. 62 (France).

¹⁵ Cummins, *supra* note 10, at 602.

¹⁶ It should be noted that the complete exclusion of the courts from a rights framework best preserves strong parliamentary sovereignty. But as earlier noted, this article takes as its baseline the government’s preferred rights framework which includes an important but limited role for the courts – *see supra* note 6 and accompanying text. My thanks to Andrew Lynch for this point.

¹⁷ An advisory opinion involves a court giving its view on a question of law when there is no “immediate right, duty or liability to be established by the determination of [a] Court” – *Commonwealth v. Queensland* (1975) 134 CLR 298, 325 (High Court of Australia, 1975). For this reason an advisory opinion is not an exercise of judicial power, the hallmark of which is the determination by a Court of some immediate legal controversy.

¹⁸ It should, however, be noted that this is not the case under the French Constitution of 1958 where article 62 states that “[a] provision that has been declared unconstitutional [by the Constitutional Court] may neither be promulgated nor applied.”

¹⁹ For example, *see* Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, in *CONSTITUTIONALISM IN THE CHARTER ERA* 39-46 (Grant Huscroft and Ian Brodie, eds., 2004) for an account in the American context of the legislative arm of government providing a well-reasoned and moral argument about the nature of religious freedom.

²⁰ Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. L. S. 18, 49 (1993).

content of a right (and often the correlative duty) are inherently contestable, then no person or institution can lay claim to definitive wisdom or truth on these matters.²¹

A rights framework that provides for pre-legislative scrutiny by a judicial body takes parliamentary sovereignty seriously. For the provision of an *advisory opinion* by a judicial body at this stage of the parliamentary process makes it functionally closer to a third legislative chamber than a court.²² Moreover, the provision of a pre-legislative *advisory opinion* by a court is, in my view, more sensitive to and accommodating of the reality of disagreements about rights than a post-enactment incompatibility *declaration*. The notion of an *opinion* recognises that this is *the court's view* as to the content or scope of a right and not that a definitive and final rights determination is being (or even can be) made. This acknowledges, quite properly in my view, that there is “much room...for honest and good faith disagreement among citizens on the topic of rights”²³ and that judges, though capable of making an important and valuable contribution to this end, do not have a mortgage on rights wisdom.²⁴ And the provision of advisory opinion rather than an incompatibility declaration may prove more conducive to the kind of meaningful and balanced rights dialogue between the arms of government that some consider a key virtue of statutory Bills of Rights.²⁵ Thomas Poole, for example, has made the following observation regarding the operation of the *Human Rights Act 1998* (UK) (“UK HRA”):

[An] unintended side-effect of the hybrid system is that it seems to encourage courts to interpret their way to results rather than referring them back to the legislature for a final decision. This at least has been the experience of the United Kingdom, where judges have tended to use (sometimes rather boldly) the power granted by section 3 of the Human Rights Act to read and give effect to legislation in a way which is compatible with the

²¹ See *Id.* at 28-31 and 49-51; Tom Campbell, *Democracy, Human Rights and Positive Law*, 16 SYDNEY L.REV. 195, 200-4 (1994).

²² This point is made in relation to the French Constitutional Court by Martin Shapiro, *Judicial Review in France*, J.L. & POL'Y 531, 536-548. In addition, vesting such a power in the Victorian Court of Appeal would not, in my view, offend the principle derived from *Kable v. Director of Public Prosecutions*, (NSW) (1996) 189 CLR 51 (High Court of Australia, 1996). The power to provide an advisory opinion on a *question of law* would not impair “its institutional integrity [in a manner that is] incompatible with its role as a repository of federal jurisdiction” – *Baker v. The Queen*, (2004) 210 ALR 1, 4-3 (High Court of Australia, 2004).

²³ Waldron, *supra* note 20, at 49.

²⁴ I am in agreement with James Allan, Tom Campbell and Jeremy Waldron amongst others to the extent that judges do not “have some sort of pipeline to heavenly wisdom and that *their* views are a better indication of truth than elected legislators’ views on the questions of which statutory provisions are inconsistent with the BOR rights and of whether they are anyway reasonable or justified.” (Allan, *supra* note 5, at 328) I am, however, in favour of giving courts an important but limited role in a Victorian rights framework. Even if courts are not (quite properly) given the final say on questions of rights, it seems wrong to me to deny the important contribution they have made (and still make) in other jurisdictions and imprudent to eschew the vast reservoir of international rights jurisprudence now available.

²⁵ See, for example, in the ACT context: ACT BILL OF RIGHTS CONSULTATIVE COMMITTEE, TOWARDS AN ACT HUMAN RIGHTS ACT: REPORT OF THE ACT BILL OF RIGHTS CONSULTATIVE COMMITTEE 61-63 (May 2003); Julie Debeljak, *The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights*, 15 PUBLIC L. REV. 169 (2004).

Convention rights rather than their power to issue declarations of incompatibility under section 4...[T]his choice, when viewed from a dialogic standpoint, may be counted as a failure since it achieves the opposite of what a dialogue model sets out to achieve.²⁶

And even when a post-enactment incompatibility declaration is made, it may operate to close down any further institutional rights dialogue though the final (legal) say remains with the Parliament. The institutional authority of Australian courts and the respect generally accorded to their decisions may make their rights determinations definitive in the eyes of many and therefore off limits to the legislature as a practical matter.²⁷ Providing for scrutiny by a judicial body before rather than after the enactment of a law will not, of course, remedy this. But given time, a mechanism that provides for of an advisory (rights) opinion may come to be understood and accepted as part and parcel of a wider *parliamentary* process (and contingent for that reason) not a final, *judicial* rights determination.²⁸

III INVALIDATION OF INCOMPATIBLE DELEGATED LEGISLATION

In its report “Towards an ACT *Human Rights Act*”, the ACT Bill of Rights Consultative Committee (“Consultative Committee”) noted that the UK *HRA* was “carefully designed to avoid encroaching directly on the traditional principle of parliamentary sovereignty.”²⁹ One important manifestation of this concern and principle was the power vested in the courts to invalidate delegated legislation incompatible with the *Human Rights Act 2004* (ACT) (“ACT *HRA*”) unless authorised by the parent Act.³⁰ The Consultative Committee recommended a similar power for the ACT *HRA* but this was not acted upon.³¹

But as Julie Debeljak notes, “[t]here is no threat to parliamentary sovereignty in the judiciary invalidating delegated legislation that the primary legislator has not authorised.”³² Indeed if parliamentary sovereignty is taken seriously, then this invalidation power *must* be included within the government’s preferred rights framework. By securing executive responsibility and accountability (in this instance for the rights impact of its laws) to the parliament, it does no more than ensure that so far as possible the will of Parliament as expressed in (human rights) law is pre-

²⁶ Thomas Poole, *Bills of Rights in Australia*, 4 OXFORD U.C.L.J. 197, 202-203 (2004)

²⁷ On this point see Carolyn Evans, *Responsibility for Rights: The ACT Human Rights Act*, 32 FEDERAL L.REV. 291, 298-299 (2004); Waldron, *supra* note 19, at 47.

²⁸ See *supra* note 22 for my response to the possible objection to this component of a Victorian rights framework based on the *Kable* principle.

²⁹ See ACT BILL OF RIGHTS CONSULTATIVE COMMITTEE, *supra* note 25, [3.41].

³⁰ Human Rights Act, 2004, ss 3 & 4 (ACT)

³¹ But see Evans, *supra* note 27, at 303 for an interesting observation that the exclusion of the power for courts to invalidate delegated legislation may not prevent this from occurring if there is a “[q]uestion of whether a broad delegation of power implicitly included the right to behave in a manner that disregarded the rights in the Act”.

³² Debeljak, *supra* note 25, at 175.

served and promoted.³³ It is all the more desirable (and urgent) a reform in my view, when so much Australian law now promulgated is delegated rather than primary legislation³⁴ and the defining characteristic of our political system is executive dominance not responsible government.³⁵

IV THE APPLICATION OF THE BILL OF RIGHTS

Stephen Gardbaum notes that “among the most fundamental issues in constitutional law is the scope of application of individual rights provisions”.³⁶ Whether, for example, a framework for the protection of rights has a horizontal as well as vertical effect? That is, do “rights regulate only the conduct of governmental actors in their dealing with private individuals (vertical) or also relations between private individuals (horizontal)”³⁷? The problem has arisen most recently in the ACT. Section 4 states that the ACT *HRA* “applies to all Territory laws”³⁸ but is silent as to whether this exhausts the scope of its application. As Carolyn Evans explains,

[i]n the case of administrative law this leaves some complex issues in the hands of the judiciary. For example, to what extent are private bodies exercising public powers to be subjected to the Act? What are public powers in this context? Does the Act apply to Cabinet decisions or deliberations? Does it extend to exercise of non-statutory executive powers? Outside the administrative law context the absence of an application clause also leads to some difficult questions, including whether and to what extent the courts are bound by the Act (for example, in the administration of justice, in the development of the common law) and whether it might have a horizontal effect between private parties. *If this Act was intended to assert the primacy of the legislative authority in rights protection it is hard to understand why such crucial issues were left to judges.*³⁹

If parliamentary sovereignty is taken seriously within the government’s preferred rights framework, then in my view two points emerge from the application ambigu-

³³ This might also be done through the pre-legislative rights scrutiny of Victorian delegated legislation. For example, s 10 of the Subordinate Legislation Act, 1994, (Vic) could be amended to require every regulatory impact statement to include a statement that the proposed delegated law is rights compatible. My thanks to Adam McBeth for this point.

³⁴ On this point see DENNIS PEARCE & STEPHEN ARGUMENT, *DELEGATED LEGISLATION IN AUSTRALIA* 7-10 (2d ed. 1999); Justice Michael McHugh, *The Growth of Legislation and Litigation*, 69 AUSTRALIAN L.J. 37, 38-39 (1995).

³⁵ On how the marriage of responsible government and strict party discipline has resulted in executive dominance of the parliament in Australia see Geoffrey Lindell, *Responsible Government*, in *ESSAYS ON LAW AND GOVERNMENT – VOLUME 1: PRINCIPLES AND VALUES* 75, 93-97 (Paul D. Finn ed., 1995)

³⁶ Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L.REV. 387, 388 (2003)

³⁷ *Id.*

³⁸ Human Rights Act, 2004, s 29 (ACT).

³⁹ Evans, *supra* note 27, at 304-305 (my emphasis).

ity problem in the ACT *HRA* (and those in other jurisdictions⁴⁰) and the italicised Evans observation in the above quotation. First, the Bill of Rights must make as clear as possible those persons and bodies to whom it applies.⁴¹ The sovereignty of Parliament in this regard - that is the extent to which it wishes to provide rights protection - cannot be preserved and promoted by the courts (or other public officials and bodies) and private (legal) persons without this kind of clear textual guidance. And second, it *ought* to apply to any person or body that performs a public function, power or duty.⁴² This would include the courts and, assuming the justiciability of the subject matter,⁴³ even decisions made by the Governor in Council or when acting on ministerial advice, whether sourced to the Constitution, statute or the common law.⁴⁴ For if the rule of law means that the executive government must obey the law, then there is a compelling principle for why *all* executive or governmental action must be compatible with (human rights) law.

In applying to the courts, a Victorian rights framework would have an indirect horizontal effect. Gardbaum explains indirect horizontality in the American constitutional law context in the following terms:

All law, including common law and the law at issue in litigation between private individuals, is directly and fully subject to the Constitution...[It] does not render private actors bound by the Constitution but it does mean that individual rights provisions have significant impact on them. By governing their legal relations with each other, such rights limit what private actors can lawfully be empowered to do and which of their interests, preferences, and actions can be protected by law.⁴⁵

⁴⁰ *Id.* at 305 where Evans notes that “there is no consensus in other common law countries [such as the UK, New Zealand, South Africa or Canada] about issues such as the applicability of human rights provisions to parliament, the courts or individuals acting in a public capacity”; see also Gardbaum, *supra* note 36, at 393-411 (Vertical and Horizontal Effect of Individual Rights: The Spectrum of Positions in Comparative Constitutional Law).

⁴¹ It should, however, be noted that even in jurisdictions such as the UK where there is express textual guidance as to scope of the Human Rights Act, there is still room for ambiguity and disagreement as to the person and bodies to whom it applies – see K D Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 89-91 (1999)

⁴² This is the language found in the New Zealand Bill of Rights Act, 1990, s 3 (NZ). It seems to me that it is the nature of the power not the particular person or body that stamps it as being relevantly “public” for the purpose of the applicability of a Bill of Rights. On this issue in administrative law more generally see Mark Aronson, *Is The ADJR Act Hampering the Development of Australian Administrative Law?*, 15 PUBLIC L. REV. 202, 212-213 (2004)

⁴³ The nature of the subject matter of some prerogative powers – for example the prerogatives relating to the control of the armed forces – makes them inappropriate for judicial review. In *The Queen v. Toohey; Ex parte Northern Land Council*, (1981) 151 CLR 170, 220 (High Court of Australia, 1981), Mason J that “the cases in which the courts have refused to examine the exercise of prerogative powers reveals that most, if not all, of the decisions, can be justified on the ground that the prerogative power in question was not, owing to its nature and subject matter, open to challenge for the reason put forward.” On the issue of the justiciability of prerogative powers more generally see GEORGE WINTERTON, *PARLIAMENT, THE EXECUTIVE AND THE GOVERNOR-GENERAL* 134-139 (1983).

⁴⁴ On this point more generally see Chief Justice Murray Gleeson, *THE RULE OF LAW AND THE CONSTITUTION* 67-68 (2000).

⁴⁵ Gardbaum, *supra* note 36, 390-391.

A consequence of indirect horizontality would be the requirement that Victorian courts develop the common law in a manner which is rights compatible.⁴⁶

If parliamentary sovereignty is the power “to make or unmake any law whatever its content”,⁴⁷ then of course it does not require or mandate the extent to which a rights framework must apply. That too is a choice for the Parliament. But parliamentary sovereignty is also the constitutional recognition of the *legal* supremacy of the parliament over the executive *and* judicial arms of government. So once the will of Parliament is expressed through the enactment of (human rights) law, then in my view its sovereignty in this respect is secured if it applies to the executive and judicial arms of government and to all manifestations of public power.⁴⁸

V THE PROVISION OF A REMEDY

In Part IV of this article I made an argument regarding the extent to which the government’s preferred rights framework ought to apply to secure the sovereignty of parliament. As a corollary of this, the provision of an appropriate remedy should be available for the exercise of a public function, power or duty (whether sourced to the prerogative or an otherwise compatible law) in a manner which offends a protected right(s). The *UK HRA*, for example, makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right”⁴⁹ and provides that “[i]n relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”.⁵⁰ This includes an award of damages if “the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.”⁵¹

⁴⁶ This conception of indirect horizontality applies in the UK: *Douglas v. Hello! Ltd*, [2001] 2 All ER 289; *Venables v. News Group Newspapers Ltd*, [2001] 1 All ER 98. In the same way, the High Court of Australia has held that whilst the implied freedom of political communication in the Australian Constitution does not create new private law rights, the common law must be developed to conform with the Constitution – *Lange v. Australian Broadcasting Corporation*, (1997) 189 CLR 520, 556 (High Court of Australia, 1997).

⁴⁷ ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 40 (10th ed. 1959).

⁴⁸ I note here without exploring in any detail the difficulty of framing a clear and unambiguous application provision – *see supra* notes 40-41. However, the comprehensive application provision in s 3 of the *New Zealand Bill of Rights Act 1990*, (NZ) may provide useful starting point. It reads: This Bill of rights applies only to acts done (a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law. In addition, a subsection (c) could be inserted that makes clear that the reference in (b) to the judicial branches of government requires the courts to develop the common law to conform to the Bill of Rights.

⁴⁹ *Human Rights Act, 1998*, s 6 (UK).

⁵⁰ *Human Rights Act, 1998*, s 8(1) (UK).

⁵¹ *Human Rights Act, 1998*, s 8(3) (UK).

Incorporating similar provisions in a Victorian Bill of Rights would be inconsistent with that part of the Statement of Intent where the Government makes clear that it “does not wish to create new individual causes of action based on human rights breaches.”⁵² But to do so, again, does no more than secure so far as possible the will of the (Victorian) parliament as expressed in (human rights) law. It would be odd indeed and contrary to the rule of law, if a parliamentary directive that a range of rights are to be protected in Victoria was not applicable to *and enforceable against* those persons and bodies entrusted with the administration of government and the performance of the public functions.⁵³ Moreover, as Poole points out:

[T]o deprive aspiring litigants of the most obvious procedural avenue for bringing a suit on rights-based grounds must be seen as running counter to the whole *raison d’être* of a provision for the legal protection of rights.⁵⁴

In relation to litigation between private parties, however, not providing a new, freestanding cause of action for rights breaches – direct horizontality - is understandable and maybe even desirable. As noted, this is the case with the UK *HRA* model which instead provides for indirect horizontality.⁵⁵ K D Ewing explains its operation in the following terms:

[The] Convention rights may be relied upon in litigation between private parties, but cannot themselves be the basis of a cause of action. So although a worker dismissed for a reason incompatible with the Convention may not sue his or her employer for a breach of a Convention right, the worker in question may be able to sue for wrongful dismissal, claiming that a dismissal for a reason incompatible with a Convention right is wrongful.⁵⁶

It might be said that, to the extent that existing causes of action may not encompass the full range of human rights breaches that may occur between private parties, the will of parliament as evinced in (human rights) law is not fully secured. But the need for certainty in private law relationships and a healthy respect for individual autonomy and privacy are legitimate concerns and important characteristics of a liberal democracy. And in any event, my argument that taking parliamentary sovereignty seriously entails that a rights framework ought to apply to the judicial and executive arms of governments and those persons or bodies that perform public functions, powers or duties, is unrelated to purely private zones of conduct.

⁵² STATEMENT OF INTENT, *supra* note 1.

⁵³ The ACT Consultative Committee stated that “[t]he ACT Human Rights Act should provide that all public authorities must act in a way or engage in conduct that is compatible with the Human Rights Act, unless the incompatible conduct is required by the legislation.” – *supra* note 25, 73. This was recommendation was not, however, included in the Human Rights Act, 2004 (ACT).

⁵⁴ Poole, *supra* note 26, at 206.

⁵⁵ See *supra* note 46.

⁵⁶ Ewing, *supra* note 41, at 89.

VI CONCLUSION

This article has argued that if parliamentary sovereignty is to be taken seriously within the Victorian government's preferred rights framework, then the four proposals outlined are worth considering for incorporation. The first two proposals preserve the core ideal of parliamentary sovereignty as no person or body can set aside a law once enacted (a rigorous system of *pre*-legislative scrutiny) nor provide for its override (the power of judicial review of incompatible delegated legislation).

I have also made an argument that stems from parliamentary sovereignty being the constitutional recognition of the legal supremacy of the parliament over the executive and judicial arms of government. So once the will of Parliament is expressed through the enactment of (human rights) law, then its sovereignty in this respect is better secured if it applies to the executive and judicial arms of government and all manifestations of public power. This should include an express parliamentary directive that the courts must develop the common law in a manner that is rights compatible. And the corollary of my application proposal is the availability of an appropriate remedy in the event that a public function, power or duty - whether sourced to the prerogative or an otherwise compatible law - is performed in a manner that offends a protected right(s).