Legislative counsel and pre-legislative scrutiny

Stephen Argument[1]

Introduction

The theme of this paper is that (in my experience) legislative counsel undertake a form of pre-legislative scrutiny, in the sense that they draft with one eye on the scrutiny of their drafts that is likely to take place later. In Australia, this scrutiny can be expected to come principally from the legislative scrutiny committees of the various Australian parliaments and from the courts. The paper concentrates on parliamentary scrutiny and on the important relationship between legislative counsel and legislative scrutiny committees.

Legislative counsel and "the first bulwark"

In its *Eighty-seventh Report*, the Senate Standing Committee on Regulations and Ordinances published a Special Report by its (then) Legal Adviser, the late Professor Douglas Whalan, on subdelegation of powers. In that Report, Professor Whalan suggested that the Senate Standing Committee for the Scrutiny of Bills was "the first bulwark" in certain aspects of legislative scrutiny.[2]

One of my primary contentions is that legislative counsel are in fact the first bulwark in legislative scrutiny. In making this assertion, I note that it is neither a novel nor a revolutionary proposition. For example, Miss Rowena Armstrong QC, (then) Victoria's Chief parliamentary counsel, told the Fourth Australasian and Pacific Conference on Delegated Legislation and First

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[1] Legislative Drafter, Commonwealth Office of Legislative Drafting and Publishing, Canberra. Any views expressed in the paper are views of the author and not those of OLDP. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

[2] Senate Standing Committee on Regulations and Ordinances, *Special report on subdelegation of powers - Eighty-seventh Report* (November 1990), at p. 4.

Australasian and Pacific Conference on the Scrutiny of Bills (held in Melbourne from 28 to 30 July 1993) that—

> it is certainly the very existence of the Parliamentary Committee that often gives the drafter the sanction that is needed: you know what the Committee will say if you try that one.[3]

The point to note here is not the role of the Parliamentary Committee but the fact that the legislative counsel would both refer to the Committee and rely upon it for authority in advising client agencies that legislation might offend the legislative scrutiny principles that the various committees seek to uphold.

A similar point was made by the Commonwealth's (then) First Parliamentary Counsel, Ian Turnbull QC, at a seminar held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Turnbull said—

> I think it is safe to say that the provisions that get into Bills and that come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very important weapon in our armoury.[4]

Mr Turnbull's point was acknowledged by the (then) Deputy Chair of the Scrutiny of Bills Committee, Senator Amanda Vanstone, who thanked the Office of Parliamentary Counsel for its role in assigning "certain unwelcome legislative practices … to the legislative equivalent of Siberia".[5] How does this occur? It may assist to begin by considering the role of the legislative counsel.

The role of the legislative counsel

The current Commonwealth First Parliamentary Counsel, Peter Quiggin, recently made the following statement about the role of a legislative counsel:

> 3. The core function of a drafter is to draft legally effective, clearly expressed legislation that best achieves the instructors' policy intentions and does so, as far as possible, within the timetable set down by the government.
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> 4. It is worthwhile articulating the parameters within which an Australian Commonwealth drafter works:

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3 Armstrong, RM, "Drafting: Should delegated legislation be drafted by a specialist drafting office?", at p. 4.

4 Turnbull, I, in "Ten years of Scrutiny – A seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills" (held on 25 November 1991 – available at http://www.aph.gov.au/Senate/Committee/scrutiny/10_years/report.pdf) at p. 62.

5 Vanstone, A, in "Ten years of Scrutiny", above n. 4 at p. 57.

- The drafter's role is collaborative—the drafter is expected to work with the instructing area to analyse policy, flesh out alternatives and resolve problems.[6]

Speaking in 1991, one of Mr Quiggin's predecessors, Mr Turnbull, said (of legislative counsel):

> We are boffins of a sort. Our primary role is to put into legal effect the policy proposals of the Government, and this means that we have no role whatsoever in the formulation of policy. We are part of the Executive described by Senator Vanstone but we are rather a part of the Executive with a difference. As we have no say in the formulation of policy, we tend to adopt possibly a more objective approach to the making of law.

These sentiments are not limited to Australia. Similar views are echoed in a statement from the United Kingdom Office of Parliamentary Counsel:

> Even in their normal default role, parliamentary counsel will often be able to make a significant contribution to policy-making. Their professional expertise and experience can help them to identify and test the consistency and coherence of different policy options, to analyse proposed legislative structures and to identify factual permutations, avoidance possibilities and technical solutions for particular problems. Their insight into the parliamentary process and into the practice of the courts when interpreting and applying legislation may also be of value in this process. So they may be able to draw attention to a proposal that is likely to attract particular difficulties either in Parliament or the courts.
>
> One way in which parliamentary counsel can sometimes help departments is by pointing out that innovative or direct legal solutions about which a department might otherwise have felt inhibitions are permissible and draftable after all. This is why it is often helpful to involve parliamentary counsel in a project early on, and why instructions should explain the reasoning behind a decision to reject an apparently attractive or obvious solution.[7]

This reflects an acceptance that legislative counsel are not mere "wordsmiths" and acknowledges that they can also have a subtle role in policy-making. Again, I note that this point has previously been discussed within CALC. In a paper delivered on his behalf, Stephen Laws, First Parliamentary Counsel of the United Kingdom, has stated:

> … we are professionals with professional standards and we are not officials of the instructing departments – rather we are a central service who can stand outside the policy making process and bring a degree of objectivity to the analysis of what it has produced.[8]

Mr Laws went on to say:

> It is this aspect of the role that is perhaps the area of greatest controversy, and the area where it is most difficult to distinguish between the role of counsel and wordsmith (in the extended sense I have already explained). Increasingly drafters are asked to make a

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6 Quiggin, P, "Training and development of legislative drafters", paper presented to the Commonwealth Association of Legislative Counsel conference in London, September 2005.

7 *CALC Newsletter*, February 2009 at p. 39.

8 *The Loophole*, August 2008, at p. 43.

> positive as well as a critical contribution to the formulation of policy. It is not, if it ever was, acceptable to demonstrate that a set of instructions is analytically incoherent and then to sit back and wait for a better set. Those who detect problems are expected to act like team members and to contribute to finding the solution. This includes the drafter.

He then added a note of caution:

> But where do you draw the line? Lawyers in general, and drafters in particular, do not generally make good policy makers, partly because they concentrate on possibilities rather than on an evidenced-based analysis of what happens in practice.
>
> However there is another element of our independence which undoubtedly gives us the role of counsel, rather than wordsmith. We have a function in the system of being advocates for the protection of the integrity of the statute book, and to ensure that there is no debasement of the currency of the means by which Parliament communicates with the courts.

This is an important point. The role of legislative counsel in protecting the integrity of the statute book *and* in anticipating likely issues with the courts (which, in turn, requires an up-to-date understanding of how the courts deal with various issues) cannot be understated. That said, it is also little-understood. I am confident that most legislative counsel have had experiences of clients where, from the client's perspective, the only thing legislative counsel was being asked to do was to "change a word here and there" and similarly with incredulous responses such as "how could that *possibly* affect the meaning?" I am confident that all of us have had the situation of a client going glassy-eyed in discussions about why a change in approach to the drafting of certain provisions could do them more harm than good.

To labour my reference to Mr Laws' paper just a little further, I note that he went on to say that legislative counsel's role as protectors of the statute book, etc, involved—

> … two things, and matters of substance as well as words. First, it involves fearlessly alerting Ministers to the risks of allowing short term considerations to undermine the respect the courts give to Parliamentary proceedings. The reputation of the Office and the quality of its work is one of the things that ensures that the balance is kept between the principle of Parliamentary sovereignty and the temptation for the courts to make new law to deal with hard cases. It is this that makes United Kingdom drafters so reluctant to accept unnecessary material in statutes.[9]

Secondly, our independent role means it is the function of the parliamentary counsel to draw to Ministers' attention, and particularly to the attention of the Law Officers (who have a general oversight of legal policy questions), anything in a Bill that offends constitutional principle. In those jurisdictions where there are written constitutions and it is a function of the legislative counsel to warrant the constitutionality of the legislation they draft, it seems to me unarguable that, in that function at least, the drafters act as counsel not wordsmiths. But, even in the United Kingdom, the practical need, if policy is to be effectively implemented, of ensuring that Bills conform to the rule of law, and the relatively recent statutory rule that requires Bills to be

[9] Above n. 8.

construed in accordance with the *European Convention on Human Rights*, mean that parliamentary counsel in the United Kingdom have a legal and constitutional input to the drafting of Bills, even in the absence of a written constitution.

Good client service

I think that a simple point here is that a lot of what legislative counsel do is simply to provide good service to their clients. Legislation is drafted in a way that will hopefully not meet with criticism by the courts. Equally, it is drafted in a way that will hopefully not meet with criticism in the parliament, including by parliamentary committees.

Legislative counsel and legislative scrutiny committees

In his contribution to the 1991 Senate Scrutiny of Bills Committee seminar, Mr Turnbull went on to say:

> … we do regard it as part of our role to advise on the legal principles that are involved in legislation. In particular, since the arrival of the Scrutiny of Bills Committee, we regard it as our duty to advise the departments on the Scrutiny of Bills Committee's principles and also the way in which the Committee interprets those principles. At the end of the day, if we have given this advice and the department still wants to go ahead with a provision which we think may be criticised by the Committee, we are bound by the decision of the department, as our function really is to put into legislative form what they want. The result of this, anyway, is that in practice the Scrutiny of Bills Committee and parliamentary counsel work together for the same ends, but we do have different points of view.[10]

I will say some more about Mr Turnbull's "working together" point below. I note that his point about the relationship between drafting and the Senate committees has recently been alluded to by 2 Australian academics, in their work on the effectiveness of parliamentary scrutiny committees in the protection of rights:

> The value of scrutiny then is the medium- and long-term impact on policy officers and drafters—Commonwealth drafters have long been said to draft in the shadow of Senate scrutiny. This is an area that we are particularly interested in continuing to explore.[11]

It remains to be seen what those explorations have revealed but I would be staggered if the conclusion was other than that Mr Turnbull's point was well-made.

While Mr Turnbull's comments were directed specifically at the role of legislative counsel in the Commonwealth Office of the Parliamentary Counsel, in relation to the work of the Scrutiny of Bills Committee, I believe that it is uncontroversial to say that this applies to drafters of both

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[10] Turnbull, I, in "Ten years of Scrutiny", above n.4 at p. 59.

[11] Evans, C and Evans, S, "The effectiveness of Australian parliaments in the protection of rights", paper prepared for delivery at *Legislatures and the Protection of Human Rights Conference*, Melbourne Law School, 20-22 June 2006 (available at http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/publications-and-working-papers/index.cfm).

primary and subordinate legislation in the various jurisdictions in which legislative scrutiny committees operate. It is a fact of life that any legislative counsel worth his or her salt will warn their clients against the potential difficulties for provisions that are likely to attract attention from a legislative scrutiny committee.

This reflects my experience as both a legislative counsel and as an instructor of legislative counsel. In my experience as an instructor, I have received (literally) hundreds of comments from legislative counsel about the likelihood of particular provisions attracting the attention of one or other of the Senate's legislative scrutiny committees. If anything, I have found legislative counsel to raise matters out of an abundance of caution. I have invariably found that advice to be wise.

My experience as a legislative counsel is relatively slight, so I do not propose to say too much from that perspective. I do not think I am talking out of school, however, when I say that (in my experience) the training of legislative counsel, drafting manuals and check-lists highlight the work of the various legislative scrutiny committees and the kinds of issues that are likely to attract comment. In the Commonwealth Office of Legislative Drafting and Publishing, the work of the legislative scrutiny committees also features heavily in the training that we provide to our clients about how their interactions with the Office can be optimised. None of this is new or revolutionary. It is common sense. It is about legislative counsel doing what they can to assist in putting into legal effect their clients' policy proposals. As I said, it's about *good client service*.

Working together

I would like to say some more about Mr Turnbull's point about legislative counsel and legislative scrutiny committees working together. In this context, I note that I have a peculiarity of experience, in that I have worked on both sides of the legislative scrutiny "fence", having worked for legislative scrutiny committees prior to becoming a legislative counsel.

One of the things that I have realised, especially after my more recent experience of, at the same time, both drafting (Commonwealth) delegated legislation and also advising on (Australian Capital Territory) subordinate legislation is that, to a large extent, legislative counsel and legislative scrutiny committees have a common goal: to produce "better" legislation. To me, that seems like common sense but I wonder whether that is the case.

"Better" legislation

What do I mean when I refer to "better" legislation? From a legislative scrutiny perspective, I mean legislation that does not offend against the principles of the relevant legislative scrutiny committee. Taking the ACT Committee's scrutiny of subordinate legislation as an example, the Committee considers whether such legislation—

- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;

- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- contains matter that in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The Committee also considers whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee.

As to the subordinate legislation itself, however, surely it is in everyone's interests if subordinate legislation is in accordance with the general objects of the Act under which it is made (whether those objects are expressed or only implied). Indeed, part of a legislative counsel's responsibility is to draft only legislation that is within the relevant legal limitations. If legislation is not "within power", there is always the potential for the subordinate legislation to be found to be invalid. "Better" subordinate legislation, therefore, is within the general objects of the Act under which it is made.

Similarly, it is in everyone's interests that subordinate legislation should not trespass unduly on rights previously established by law. While government departments and agencies might not have quite the same interest in this issue as the Committee, a failure to pay heed to this principle might also be a potential basis for subordinate legislation being found to be invalid, particularly in jurisdictions (such as the ACT) with a Human Rights Act or equivalent.[12] So "better" legislation does not interfere unduly with existing rights.

In the same vein, legislation that makes rights, liberties, etc. unduly dependent on non-reviewable decisions runs the risk of challenge in the courts, on the basis that the legislature could not possibly have intended that decisions in relation to significant rights, etc. were not subject to review. So it is "better" that review is provided for.

It is a bigger stretch for me to make an argument about legal validity and the term of reference that relates to matters that are more appropriately dealt with in primary legislation. That said, from a legitimacy perspective (at least), surely it is "better" for all concerned if problematic initiatives are dealt with in primary legislation, rather than subordinate legislation, if only because, if the legislation is challenged, those defending the validity of the legislation can point to the *Hansard* and argue that, in fact, the legislature *did* intend to make legislation with that effect.

These elements of "better" legislation are not inconsistent with what a legislative counsel is trying to achieve. From a legislative counsel's perspective, "better" legislation is legislation that is within power (and that does not get challenged in the courts) and does its job, preferably in a way that everyone can understand. There is, of course, the added imperative that legislation should

[12] See the decision of the ACT Supreme Court in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005), in which Higgins CJ (among other things) used the ACT's *Human Rights Act 2004* to determine the proper limits of certain legislation.

not get slowed down or tripped-up by comments from a legislative scrutiny committee. The real point, however, is that, in my view, legislative counsel do not *want* their legislation queried by a legislative scrutiny committee, as much because they do not want to risk the legal consequences mentioned above as because they do not wish to attract the ire of a committee. This is, I think, part of what Mr Turnbull was saying.

Legislative counsel and Bills of Rights

It is trite to observe that there is an increasing impetus (especially in Australia) for legislative scrutiny based on "human rights" criteria. In 2 Australian jurisdictions, the ACT and Victoria, human rights legislation is formally part of the legislative framework.[13] This means that legislative counsel in those jurisdictions must now also draft with the rights set out in the relevant legislation in mind. It also means that the relevant parliamentary scrutiny committees scrutinise legislation against criteria set out in human rights legislation.[14]

I do not propose to discuss in any detail the impact of human rights legislation on legislative counsel, not the least because this is clearly still a developing area. I will, however, commend to you a 2006 paper by Joanna Davidson, New Zealand Crown Counsel, on the New Zealand experience of developing legislation, in the context of the (NZ) Bill or Rights.[15] That paper sets out in detail the role of government lawyers in the development of legislation and the impact of the *Bill of Rights* on that process.

I also commend to you the New Zealand Legislation Advisory Committee's publication, *Guidelines on process and content of legislation*,[16] which also sets out in detail the process that needs to be followed in developing legislation in New Zealand, again, particularly with the *Bill of Rights* in mind. The obvious point to make is that (in those jurisdictions that have it) human rights legislation is another thing that legislative counsel have to deal with in providing service to their clients. In some ways, the existence of human rights legislation may actually make the work of legislative counsel easier, in the sense that human rights legislation tends to be more structured than the combined, accumulated learning on the likes and dislikes of legislative scrutiny committees (which may also vary from time to time).

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13 See *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

14 Though, interestingly, in the ACT, there is no formal requirement for human rights scrutiny of *subordinate legislation* by the Committee: see *Human Rights Act 2004*, section 38.

15 See Davidson, J, "The role and impact of the government lawyer in pre-legislative scrutiny" (available at http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/international-conference/conference-papers-and-presentations/index.cfm).

16 Available at http://courts.govt.nz/lac/pubs/2001/legislative_guide_2000/checklist.html

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Legislative counsel and legislative scrutiny in Canada

Without wishing to labour the international examples, I would also like to draw attention to an explanation of the situation in Canada, that is set out in a paper by Katherine MacCormick and John Mark Keyes, of the Legislative Services Branch of the (Canadian) Department of Justice. I find it particularly interesting in its concentration on the role of legislative counsel:

> As lawyers, drafters have been educated in the values that lie at the heart of our legal system. Although some of these values are now protected by constitutionalized rights, not all of them are, or their protection is quite limited. In Canada, these values include—
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> - procedural fairness and natural justice;
> - access to the courts;
> - prospective application of the law;
> - property rights;
> - parliamentary sovereignty (non-delegation of authority over fundamental matters such as the imposition of taxation or the creation of offences).
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> In addition, the Gender Equality Initiative of the Canadian Department of Justice calls on drafters to be especially vigilant that legislation does not have an adverse impact on women or members of other traditionally disadvantaged groups. Drafters should be aware of the Departmental Policy on Gender Equality Analysis and they are encouraged to turn to the gender equality specialists in the Legislative Services Branch for help in identifying these impacts and trying to avoid them.
>
> Drafters have a role to play in ensuring that incursions on these values are fully considered before they are drafted into legislation and that the Cabinet has clearly authorized them. They should look for solutions that achieve the underlying policy objectives without infringing these values.[17]

On this approach, the role of the legislative counsel, if not already onerous enough, is made more onerous because of his or her education in "the values that lie at the heart of our legal system". I have to say that I agree heartily with my Canadian colleagues.

Legislative scrutiny in Hong Kong

It is appropriate that I say something, briefly, about the role of Jimmy Ma[18] and his colleagues as legal advisers to the Hong Kong Legislative Council in the scrutiny of legislation by that Council. As I understand the legislative process in Hong Kong, the legal advisers, on behalf of the Legislative Council, provide advice on both primary and subordinate legislation that is considered by that Council. Mr Ma has indicated that this advice addresses—

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17 MacCormick, K and Keyes, JM, "Roles of Legislative Drafting Office and Drafters" (available at http://www.ciaj-icaj.ca/english/publications/ (look for LD94-Maccormick.eng.pdf).

18 Chief Legal Adviser to the Hong Kong Legislative Council.

- whether the Bill concerns any significant policy or measure or is just technical in nature;
- the effectiveness of its provisions as drafted in achieving its avowed objectives; and
- whether there are any underlying legal issues that need to be canvassed.

From my (admittedly limited) research, it appears that the concept of "underlying legal issues" includes whether or not legislation is in accordance with the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the Basic Law). The Basic Law, among other things, enshrines many of the principles with which legislative scrutiny committees are concerned, whether or not they operate in a jurisdiction with a Bill of Rights (or equivalent), including—

- that no law enacted by the Legislature shall contravene the Basic Law (Article 11);
- equality before the law (Article 25):
- the right to vote (Article 26);
- freedom of speech, freedom of the press and of publication, freedom of association, freedom of assembly, freedom of procession and of demonstration and the right and freedom to form and join trade unions and to strike (Article 27);
- freedom from unlawful arrest, detention or imprisonment and the prohibition of torture (Article 28);
- protection of private property from arbitrary or unlawful search (Article 29);
- freedom and privacy of communication (Article 30); and
- freedom of conscience and religious belief (Article 32);

This is by no means an exhaustive list and the examples set out are merely illustrative of the sorts of issues that the Basic Law deals with. I also note that, in addition to the enumerated principles, Article 39 of the Basic Law provides:

> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

As I understand the work of the legal advisers to the Legislative Council, part of their role is to advise on the extent to which legislation complies with the Basic Law and, in particular, to draw to attention instances where legislation may be inconsistent with the Basic Law. Their role seems to be similar to that undertaken by the legal advisers to the various legislative scrutiny

committees in Australia.[19] Indeed, when I looked at some examples of the work of Mr Ma and his colleagues, I was struck by similarities with the work of the Senate Standing Committee on Regulations and Ordinances, in the sense that I found examples of their exchanges of correspondence between and "the Administration" (which I took to be equivalent to "the Government" or "the Department") on issues of concern.[20] While I do not pretend to have undertaken extensive research of this issue, my initial reaction is that the resemblances are uncanny.

The theme of the conference

I would now like to take a little time to address some of the questions posed as part of the theme of the Conference.[21] *Whose law is it?* Unsurprisingly, it is my view that everyone at the Conference has some "ownership" of the law that they draft. Not so much as authors but as people who have an important role to play in the development of legislation and, in particular, as people who (as part of that role) seek to ensure that certain standards (for want of a better word) are met.

How can legislative counsel ensure that legislation is consistent with legal principles and relevant rights-based legislation? Legislative counsel can do this by maintaining their knowledge of the relevant rights-based legislation and also their knowledge of similar rights-based principles, such as those promulgated and policed by legislative scrutiny committees. To what extent is legislation able to withstand judicial scrutiny and, in the case of delegated legislation, parliamentary scrutiny? Obviously, that depends on how well the legislation is formulated. Part of my thesis is that an intrinsic part of the role of a legislative counsel is to do all that he or she can to ensure that draft legislation is able to withstand judicial scrutiny. While there may be policy limitations on this (and while the advice of legislative counsel may not always be followed), part of the role of the legislative counsel is to ensure that his or her instructors are aware of any potential difficulties with legislation and to ensure that policy are decisions are made with those difficulties squarely before the persons making the relevant policy calls.

How can legislative counsel ensure that legislation is both effective and clear to all those who are affected by it, whether as legislators or users? It is a trite answer but, in my view, legislative counsel do this by doing their job properly. They achieve these goals by keeping up-to-date with the law and by keeping up-to-date with the work of bodies such as the legislative scrutiny committees

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19 Note that there is also a unit in the Hong Kong Department of Justice that has this function.

20 See, for example, the correspondence on the *Public Health and Municipal Services (Amendment) Bill 2008* (UK) (available at http://www.legco.gov.hk/english/index.htm).

21 I.e. the CALC conference held in Hong Kong 1-3 April 2009.

Can those affected by a particular law find it easily? As a representative of the Office of Legislative Drafting and Publishing, I am bound to say that those affected by the law can find it more easily if they are in a jurisdiction with a Federal Register of Legislative Instruments and with a database such as ComLaw.

Conclusion

My principal point in this paper is that legislative counsel have an important role in legislative scrutiny and, as a result, in maintaining legal principles and in maintaining human rights. We do so whether or not there are formal Bills of Rights in our various jurisdictions. We do so because, in our drafting, we invariably operate with one eye on the various bodies that may scrutinise our work, including the courts and (certainly in Australian jurisdictions) legislative scrutiny committees. Given those bodies' roles in maintaining legal principles and protecting human rights (whether or not those human rights are enshrined in legislation), keeping that one eye out means that we also have a role to play, even if it goes largely unnoticed.

The Commonwealth Ombudsman, Professor John McMillan, recently made a similar point, when noting the (also under-recognised) role of his Office in human rights protection:

> In summary, human rights protection is ultimately a practical exercise. Human rights principles enacted by the legislature are an important platform for that exercise. So too are courts that can definitively resolve the meaning of those legislative principles. But equally important is a comprehensive system of other agencies and mechanisms that can practically apply those principles in a myriad of different situations.[22]

Protection of human rights is not the sole province of the "human rights lawyers". Many others have a role in protecting human rights, but surely *all* legislative counsel probably have such a role. It's just that hardly anyone knows about it.

Postscript: Maybe we're not all so anonymous after all?

Part of my thesis in this paper is that the role of the legislative counsel in the legislative scrutiny process is under-appreciated. The same might be said of others who are involved in the process, including lawyers within policy agencies who advise on similar issues. A recent New Zealand example may actually tend to *disprove* that.

On 3 March 2009, the *New Zealand Herald* reported on issues arising from a "three strikes and you're out" law that had been proposed by an Act MP, David Garrett. As required by section 7 of the *New Zealand Bill of Rights Act 1990* (and as discussed in the New Zealand material that I have referred to earlier in the paper), the New Zealand Attorney-General, the Hon Chris Finlayson, tabled a report to the Parliament, drawing attention to potential inconsistencies between the provisions of the proposed law and the Bill of Rights. The report indicated that there was an apparent inconsistency between the proposed law and the section of the *Bill of Rights* that

[22] McMillan, J, "The role of the Ombudsman in protecting human rights", at p. 9 (available at http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/research_speeches_2006).

protected New Zealanders against cruel, degrading or disproportionately severe punishment (section 9). In response, Mr Garrett said that the concerns identified in the section 7 report were not Mr Finlayson's personally but those of "some oik in Crown Law**"**.[23] So much for the anonymity of legal advisers!! On 11 March 2009, Mr Finlayson told the New Zealand Parliament that the opinions expressed in the section 7 report were, in fact, his own.

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[23] See Gower, P, "Change Bill of Rights, says 3-strikes MP", *New Zealand Herald*, 3 March 2009 (available at http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10559642). I am grateful to Michael White, of the New Zealand Human Rights Commission, for drawing my attention to this article.