Human Rights: the Role of Legislative Counsel

Daniel Lovric[1]

Abstract:

This article looks at the influence legislative counsel can have on policy development in terms of human rights. Part 1 outlines recent developments in human rights in Australia. Part 2 provides some general comments about the legislative counsel's role in human rights protection, particularly noting the ad hoc or light-touch approach focusing on particular issues that arise regularly in draft legislation and deferring to human rights experts. In Part 3, the paper suggests how legislative counsel can build on the ad hoc approach and look towards a more systematic approach to human rights issues involving the notions of certainty and proportionality.

Contents

[1] First Assistant Parliamentary Counsel, Australian Commonwealth Office of Parliamentary Counsel. This paper expresses my personal opinions only. Thank you to Paul Argent for looking over a version of this paper and giving helpful comments. I own all errors!

Introduction

Legislative counsel have a subtle influence on policy development. There have been many articles written on how this influence is exercised.[2] This article looks at a particular example of such influence: namely, the influence of legislative counsel on human rights policy.

Legislative counsel have always had a significant role in human rights protection. It is well accepted that they should comment on issues such as the content of warrant provisions, search and seizure power provisions, information-collecting provisions and the details of criminal offences. Traditionally, legislative counsel are not responsible for policy in these

[2] One example is Stephen Laws, "Giving effect to policy in legislation: how to avoid missing the point," *Loophole*, Special Edition 9 February 2011 at 66.

areas. However, they do scrutinize legislative proposals in these areas – and raise warning flags for the Government to consider further if it wishes.

Two aspects of this traditional role should be highlighted. Firstly, legislative counsel have tended to take an ad hoc approach to human rights. That is, they tend to react to a limited range of issues that have been raised in the past. This approach can be very valuable, as it allows legislative counsel to draw on the collective experience of their drafting office in identifying situations requiring particular scrutiny. For example, a provision that reverses the onus of proof in a criminal offence will always be commented upon by the legislative counsel. In the Australian Commonwealth, this ad hoc approach has led to the creation of a large list of issues that the legislative counsel must refer to other government departments, in particular, the Attorney-General's Department.[3] This list is a valuable distillation of decades of experience in such issues by Australian federal legislative counsel. However, it is ad hoc in nature, and does not purport to deal with relevant issues in a systematic way so far as human rights protection is concerned.

Secondly, legislative counsel deal with human rights issues with a light touch. They have a modest view of their role in human rights protection and tend to defer, in the final analysis, to human rights experts. Legislative counsel play a role at the periphery of human rights protection – not at the centre.

I would suggest that this light-touch approach and this modest view of the legislative counsel's role are quite valuable. It would be dangerous for legislative counsel to move to a central role in human rights protection, without gaining a detailed knowledge of human rights law and practice. It may be that in some jurisdictions, legislative counsel have gained this knowledge. For example, I understand that in both Canada and the United Kingdom, legislative counsel have gained a good basic knowledge of relevant human rights law. This is not surprising given the constitutional status of human rights law in those jurisdictions. Yet, in systems where human rights do not have a constitutional status, I question whether legislative counsel should claim to have more than a peripheral role in human rights protection.

Although legislative counsel should retain their light touch in human rights matters, they should start to think about whether they could improve on the traditional ad hoc approach. The international trend towards human rights protection needs some kind of drafting response: legislative counsel cannot simply cling to traditional methods and procedures in the hope that they will continue to work in the future.

The tension for legislative counsel and human rights should be clear at this point. How can legislative counsel reconcile their modest, light-touch approach with the need for a more systematic approach in their consideration of human rights? How can they do this without

[3] *Drafting Direction No. 4.2: Referral of Bills to other agencies*, Document release 7.1, February 2011: http://www.opc.gov.au/about/drafting_series/DD4.2.pdf (visited 29 May 2011).

overstepping the boundaries of their own expertise, while at the same time providing better service to government?

This paper suggests one way in which legislative counsel can build on the ad hoc approach and look towards a more systematic approach to human rights issues. This is the subject of Part 3 of the paper, which takes recognized human rights methods of analysis and considers them from a legislative counsel's perspective. Before moving to this discussion, however, Part 1 of this paper outlines recent developments in human rights in Australia. Part 2 of the paper provides some general comments about the legislative counsel's role in human rights protection.

Part 1 – Human rights protection in Australia: recent developments

It is not the purpose of this paper to describe the robust debate about the desirability of a Bill of Rights that has taken place in Australia over the last decade. Australia is one of the only developed countries without a Bill of Rights at the level of central government. However, Australia already has a very high level of human rights protection. The federal legal system includes many effective human rights safeguards. The central question in the debate is whether human rights protection is better served by the existing system, or could be improved by the addition of a formal Bill of Rights.

Although there is no Bill of Rights in Australia at the level of the central government, there are 2 regional governments with such Bills. The Australian Capital Territory has its *Human Rights Act 2004*, and the State of Victoria has its *Charter of Human Rights and Responsibilities Act 2006*. We have now seen the first trickle of decided cases under these two Acts, including the first two declarations that legislation is incompatible with protected human rights. One of these cases, from Victoria, is currently on appeal to the High Court of Australia.[4]

It is in the light of these developments that the Federal Government introduced into Parliament the Human Rights (Parliamentary Scrutiny) Bill 2010. The Bill lapsed with the announcement of the 2010 Federal election, but was reintroduced into Federal Parliament with the re-election of the Government. It is unclear at the time of writing if and when the Bill will pass both Houses of the Parliament (keeping in mind that the Government controls neither of those Houses).

The Parliamentary Scrutiny Bill is not a Bill of Rights, although it contains some features typical of a Bill of Rights. It does not contain an enunciated list of human rights, but rather refers to human rights set out in international instruments. For the purposes of the legislative counsel, the most relevant of those instruments is the *International Covenant on Civil and Political Rights*. The Scrutiny Bill also does not propose to grant any jurisdiction to

[4] *Momcilovic v R* (2010) 265 ALR 751 (CA Vict.). The other case is *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (ACT Supreme Court).

a court to implement human rights, and accordingly contains no post-passage procedure for declarations of incompatibility. However, as I will discuss below, the Scrutiny Bill does set up the familiar pre-passage procedure of declarations of compatibility by the executive.

The Parliamentary Scrutiny Bill proposes to set up a Parliamentary Joint Committee on Human Rights, with a statutory mandate to scrutinize bills and proposed legislative instruments for their consistency with human rights. This would build on the current practice of the non-statutory Parliamentary committees on scrutiny of bills and regulations.[5] However, those non-statutory committees deal with many more issues than just human rights, and one might expect the proposed statutory committee to therefore bring a more concentrated spotlight on human rights issues.

The provisions setting up the statutory joint committee on human rights are complemented by other provisions setting up a pre-passage procedure for declarations of compatibility by the executive. This familiar process, contained in the human rights legislation of many other jurisdictions, requires the executive to publish a statement of compatibility to accompany every proposed Bill or legislative instrument. In the case of the Parliamentary Scrutiny Bill, it seems likely that these statements will be contained in the explanatory memorandum to the proposed legislation. Failure to comply with this procedure will, however, not affect the ultimate validity of the legislation if it is passed by the Parliament.

These aspects of the Parliamentary Scrutiny Bill have provoked some discussion within Australian Commonwealth drafting offices. The Bill has squarely raised the issue dealt with by this paper, namely, how legislative counsel should position themselves to deal with human rights issues. It is unclear at this point exactly what role legislative counsel will play, although one would expect that they will retain their role at the periphery of the human rights system. It is also noteworthy here that the Commonwealth Attorney-General's Department already contains a human rights branch, staffed by human rights specialists. Yet the Parliamentary Scrutiny Bill raises the question of how legislative counsel can better assist the Government, the Parliament and the general community in dealing with human rights issues.

Part 2 – Legislative counsel's role in human rights issues

As mentioned in the introduction, it is not the purpose of this paper to look at the general role of legislative counsel in dealing with policy issues. However, human rights raise particular issues relating to this general role. This Part discusses 2 such issues: the distinction between highly visible and less visible legislative proposals, and the technical ability of legislative counsel to deal with human rights law. As we will see, both issues

[5] Currently, the Senate Scrutiny of Bills Committee examines proposals for primary legislation, while the Senate Standing Committee on Regulations and Ordinances examines proposals for secondary legislation.

suggest that legislative counsel can and should play a limited but important role in protecting human rights.

Two types of proposals: highly visible and less visible

When legislative counsel deal with a proposal for legislation affecting human rights, the proposal generally falls into one of two categories.

The first kind raise *big picture, highly visible, politically controversial issues*. Examples include proposals for anti-terrorism measures, immigration rules, laws on the protection of indigenous peoples, etc. These kinds of proposals gain wide attention across the community. They attract the personal attention of politicians, they hit the front page of newspapers and they are the subject of comment by many human rights specialists. I suggest that legislative counsel have a significant, but peripheral role to play in the human rights protection system in respect of these kinds of proposals. The relevant issues are already the subject of expert discussion and public debate.

Legislative counsel still have a role in dealing with these big picture proposals. However, this role is not so much focussed on protecting human rights, but is rather focussed on the more traditional drafting goals of ensuring constitutionality and conceptual coherence.

The second kind of these proposals raise *small picture, less visible, politically less controversial issues*. Typically, these issues are raised by secondary provisions in legislation – the kind that provide the mechanics for implementing the details of a big-picture proposal. Examples of these kinds of issues include the details of criminal offences (onus of proof, mental element, etc.), search and seizure powers, warrant powers, information-collecting powers, etc. In many cases, the only people scrutinizing the content of such provisions are members of the bureaucracy.

In the case of such small-picture issues, I suggest that legislative counsel have a major role to play in human rights protection. Politicians, the media and human rights specialists may not be aware of the issues involved, or may be fully occupied with other issues. In some cases, the only person able to scrutinize a small-picture proposal from a human rights perspective will be the legislative counsel. It is his or her duty in such cases to provide such scrutiny. Nevertheless, even in these cases the legislative counsel cannot play the role of human rights protector. Rather, the legislative counsel must maintain a light-touch approach: he or she can only wave a warning flag to the government. It is the prerogative of the government to heed or ignore such a warning. Admittedly, a warning can be given with varying degrees of intensity! Furthermore, it would be very rare for a government simply to ignore a clear warning.

So we can see that the legislative counsel's role in a human rights issue expands as the political prominence of the issue decreases. A highly prominent issue will be covered by the scrutiny of politicians, human rights specialists and public opinion. An issue with little or no prominence will not have this comprehensive external scrutiny: here the legislative

counsel will become more active so as to cover some of the scrutiny gap. However, even in the latter case, the domain of the legislative counsel is a limited one. The legislative counsel holds up a light to policy problems (and obvious solutions), but deliberately refrains from becoming an active human rights advocate.

The ability of legislative counsel to deal with human rights law

The limited role of the legislative counsel is often a function of the extent of his or her knowledge of human rights law. This law can be complex in its details. A human rights lawyer usually has to deal with a national Bill of Rights, several international treaties as well as a large body of case law at the national and international level. An introductory text on human rights law usually runs to a couple of hundred pages. I suspect that in many drafting offices, there would be no expectation for counsel to read such a text. Interestingly, however, some drafting offices appear to place higher expectations on their counsel to master the basics of human rights law.[6] Nevertheless, many legislative counsel do not have the time or inclination to become human rights experts.

In many larger jurisdictions, such as in the Commonwealth of Australia, legislative counsel can rely on the advice of dedicated human rights experts. In smaller jurisdictions, the legislative counsel may be "multitasking", playing both the legislative drafting role and a human rights advisory role. My comments here about the limited role of legislative counsel in human rights issues may appear strange to those "multitaskers". However, one can see the role of legislative counsel in the larger jurisdictions as being a kind of ideal type: the role of the legislative counsel unencumbered by other responsibilities.

Despite the limited time available for legislative counsel to study human rights law, and despite the availability in larger jurisdictions of specialized human rights advice, it is useful for legislative counsel to have a basic working knowledge of human rights law. It is possible for them to gain this basic working knowledge without a huge investment in time and training. There are a number of reasons for this possibility.

Firstly, only a small slice of human rights case law affects the day-to-day work of legislative counsel. Most human rights case law deals with the application of legislation or executive power in a particular situation. These kinds of cases do not deal with the abstract, generalized issues concerning legislative counsel. It is only a small proportion of human rights case law that deals with these more abstract issues of the general consistency of legislation with human rights standards. Furthermore, one does not need to read a great many of these "legislative consistency" cases to gain a solid understanding of the underlying legal analysis (this analysis is outlined in Part 3 of this paper).

[6] For example, I understand that legislative counsel working for the federal government of Canada would be expected to have a solid basic knowledge of Canadian human rights law. This may be a function of the constitutional status of human rights law in Canada.

Secondly, only a handful of human rights are generally relevant to the day-to-day work of legislative counsel. Two rights in particular are relevant here: the right to a fair trial and the right to privacy.[7] I estimate that these two rights make up about 90% of a legislative counsel's human rights workload.[8] Most other human rights, while important, rarely occupy a legislative counsel's time. Rights such as the right to life, the prohibition of torture, the prohibition of forced labour, the right to vote, the freedom of assembly, the freedom of association and the right to found a family usually arise in the context of politically controversial, big picture issues. Accordingly, these are the kind of rights that are unlikely to demand a lot of attention from legislative counsel.

Therefore, despite a traditional reluctance for legislative counsel to become involved in human rights, it is no objection to say that there is no time or opportunity for them to understand human rights law. The basic outline of human rights law, as it applies in the day-to-day work of legislative counsel, can be mastered without a huge educational program. Indeed, it is possible to set out such a basic outline – in a useful, practical way – quite succinctly. The next part of this paper is an attempt to do this.

Part 3 – A standard framework for legislative counsel to deal with human rights

Introduction

This Part sets out a concise outline of human rights law and principles for the purposes of the work of legislative counsel. The main purpose of setting out this outline is to demonstrate the relative ease with which legislative counsel can gain a practical working knowledge of human rights law.

This outline is not original, and is based on the methods of courts in decided human rights case law. Nevertheless, different courts use slightly different methods and may vary these methods depending on the kind of case concerned. Furthermore, different judges may use different terminology to describe the same concept. This should be no deterrent to setting out a generalized outline of their method. In each case, one can see common elements in their analysis.

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[7] These general rights cover a number of more specific rights, including: the right to a hearing by an impartial and independent tribunal established by law, the right to a hearing within a reasonable time, the right to remain silent, the presumption of innocence, the prohibition of retrospective criminal law, the right to legal representation, procedural rights in search and seizure, the right to data security (in collection, storage and use) and legal professional privilege. The grouping of these specific rights under the general rights of "right to a fair trial" and "right to privacy" follows the structure of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. It may be that they are grouped under different general rights in other human rights instruments.

[8] At the 2011 CALC conference, I had this idea confirmed by one legislative counsel from a European jurisdiction, who said that if he could remember the details of any rights in the European Convention, it would be those in article 6 (fair trial) and article 8 (privacy). Another counsel who read over this paper also suggested that the right of non-discrimination might also be a fairly frequent issue.

The most basic concept in human rights case law is the distinction between intrusion and breach. An ***intrusion*** into a human right exists where the protected area of the right has been trespassed upon. But an intrusion into a human right is not necessarily a ***breach*** of that right. If an intrusion can be ***justified***, there is no breach of the right.[9] For example, a statute authorizing the collection of personal information clearly "intrudes" into the right to privacy. But just as clearly, such an intrusion can be justified (for example, to provide national statistics) and is therefore not necessarily a breach of that right.

It is said that some rights are absolute, and that an intrusion into such a right always amounts to a breach. For example, it is sometimes said that the right to a fair trial is absolute in this way and that any derogation from the fair trial standard is always a breach of the right. This may be a nice question for human rights specialists.[10] However, for practical purposes, the distinction between intrusion and justification still applies. Even if the fair trial standard is an absolute one, one still has to determine whether regulations or limitations on trials are "fair". This is normally a matter of asking whether such regulations or limitations are justified. Thus the distinction between intrusion and justification, in a practical sense, is still relevant in respect of the right to a fair trial.[11]

In most cases, it is relatively simple to determine whether a legislative proposal ***intrudes*** into the protected area of a human right. Such an intrusion exists, in most cases,[12] where there is any interference at all in the protected area.

This means that the issue most faced by legislative counsel is that of ***justification***. For this reason, they should be able to form an initial view as to whether a particular interference can be justified or not. The question of justification is not an open one, relying simply on instinct and gut feeling. Rather, it is a structured question built on two separate issues. Firstly, for an intrusion to be justified, it must be based on ***sufficiently certain*** law. Secondly, for it to be justified, it must also use means ***proportional*** to its purpose.[13] This

[9] As mentioned earlier, different judges use different terminology for dealing with this issue. For example, some judges may use the term "breach" in the sense of an intrusion. This does not affect the underlying analysis described here. If one uses "breach" in this sense, one might say that a "breach" that is justified is nevertheless consistent with the relevant human right.

[10] C. Grabenwarter, *Europäische Menschenrechtskonvention*, 4th edn. München, CH Beck, 2009 at 110.

[11] Ibid, at 123.

[12] Admittedly, there are some cases where the intrusion issue can be quite difficult to determine. For example, the International Covenant on Civil and Political Rights definition of the right to privacy (in article 17) only protects against "arbitrary" interferences. Determining whether a particular regulation interferes with privacy is relatively easy. However, determining whether this interference is "arbitrary" can involve difficult questions: see *WBM v Chief Commissioner of Police* [2010] VSC 219.

[13] The breakdown of the justification process into the elements of certainty and proportionality follows the structure of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

means that legislative counsel are mostly concerned with the issues of certainty and proportionality. It is worth spending some time unpacking the meaning of these two concepts.

Certainty analysis

If a law intrudes into the protected area of the human right, it can be justified only if it achieves an adequate degree of certainty. This degree of certainty will depend on the context of the law. In particular areas of regulation (such as criminal law, court jurisdiction, search and seizure and surveillance etc.), the degree of intrusion into human rights is usually quite substantial. This means that laws in these areas of regulation need an above-average degree of certainty in their operation. In other words, the more intrusive the law, the more certain it needs to be to provide a sufficient justification for human rights purposes.[14]

Legislative counsel are familiar with the danger signs in the certainty context. Firstly, a law that provides only vague concepts is in danger of being insufficiently certain. We are all familiar with criticisms of criminal offences that are too broadly drafted. Secondly, a law that leaves important aspect of regulations to delegated rules is also in danger of being insufficiently certain. Part of the certainty requirement is that the primary level of legislation in itself must provide a minimum level of guidance.[15] Thirdly, wide administrative discretions in a law may indicate a lack of certainty. If a legislative proposal involves any of these three kinds of issues, legislative counsel should be wary of the possible consequences in respect of human rights. Such issues will make a legislative proposal harder to justify for human rights purposes.

It is useful to give some examples of the certainty requirement at this point. Let us have a look at two classic cases decided by the European Court of Human Rights.

In many jurisdictions, the national Bill of Rights appears to have a different structure (e.g, with basis in law and certainty being separate issues).

However, at a more fundamental structural level, the justification process is pretty much the same under all human rights instruments. The ICCPR and ECHR structures are a handy way to describe this process.

[14] For a detailed discussed, see D. Lovric, *Deference to the Legislature in WTO Challenges to Legislation*, Kluwer, 2009, Chapter 8.

[15] In many jurisdictions (such as Australia), this proposition is not a mature legal rule. However, cases like *Malone* (see text and note 16) show that international human rights law has already moved a long way in accepting the proposition. The proposition is a well-accepted constitutional rule in Germany, Austria and Switzerland.

The first of these cases is *Malone v UK*.[16] Mr Malone was charged with handling stolen property. He was acquitted. He later claimed the police had intruded on his right to privacy by tapping his phone calls. At the time, UK phone tapping laws were a mix of executive power, administrative practice and widely drafted statute law. The European Court of Human Rights found the intrusion could be justified in theory, but that the legal basis for it in UK law was too uncertain:

> ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.[17]

This case illustrates several points about the certainty analysis. Firstly, phone tapping laws constitute a clear and deep intrusion into the protected area of the human right to privacy. This means that any phone tapping law needs to achieve an enhanced degree of certainty of operation. Secondly, the general standard of certainty (the application of which may vary in particular circumstances) is based on the ability of citizens to understand the law.[18] Thirdly, it is a dangerous practice for a government to argue that administrative practices provide sufficient certainty. In the case of deep intrusions into a protected area of a human right, a minimal degree of certainty of operation needs to be demonstrated in the primary legislation itself.

The second case is *Sunday Times v UK*.[19] The Sunday Times proposed publishing an article about a drug that was the subject of litigation. The Attorney-General obtained an injunction restraining publication – as publication would constitute a contempt of court. The Sunday Times claimed that this intruded on its freedom of expression. The intrusion was justifiable, but was the power to issue an injunction set out clearly enough? The Court held as follows:

> ... a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in

[16] [1984] ECHR 10.

[17] Para. 67.

[18] This principle is reflected in Australian law about the validity of delegated legislation. "A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey": Williams J in *Brunswick v Stewart* (1941) 65 CLR 88 at 99.

[19] [1980] ECHR 6.

> its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. [20]

One can draw the following lessons from this decision. Firstly, one needs to moderate the idea set out in *Malone* that the standard of certainty is measured against the ability of a citizen to understand the law. In many cases, or perhaps in most cases, it is acceptable to require the citizen to obtain expert advice to understand the law. That is, legislation may achieve the necessary degree of certainty even if it can only be understood by experts. However, this idea should not be taken as an absolute rule. Where it is possible to express an intrusive law such that the ordinary citizen can understand it, human rights law may require the law to be expressed in this way. Secondly, certainty need not be absolute. This should be a relief to most of us! Instead, a law that intrudes into human rights need only be as certain as it reasonably can be. Admittedly, there is a large degree of judgment involved in deciding what is a "reasonable" level of certainty.

Any legislative counsel reading the previous discussion will be struck by the familiarity of issues relating to certainty. An analysis of certainty in the human rights context raises issues that are part of their day-to-day work. This suggests that the certainty aspect of human rights analysis should pose few problems for an experienced legislative counsel.

Proportionality analysis

Perhaps less familiar to many legislative counsel is the proportionality aspect of human rights analysis.

In the past, common lawyers often had deep suspicions about the proportionality concept. Perhaps this was because of its origins in the civil law (and in particular, the police law of Germany). Alternatively, this suspicion may have arisen because of the allegedly abstract and formless nature of the proportionality concept.

Today, the proportionality concept has been entirely accepted as a part of human rights law. For example, proportionality is applied in the courts of the United Kingdom, Canada and New Zealand. It is now a firm feature of the common law world.

It is worth stressing that legislative counsel should not perform a deep ranging proportionality analysis. That kind of analysis is best left to parliamentarians, human rights specialists and courts. Instead, legislative counsel should perform a lighter scanning and scrutinizing task, only detecting obvious problems of disproportionality. The role of legislative counsel is to raise warning flags, not to find a better policy. The legislative counsel must also keep in mind that the proportionality concept always gives the

[20] Para. 49.

Parliament a "margin of appreciation" – that is, an area of unchallenged discretion – in determining whether a particular law is proportional or not.

Happily, proportionality involves a highly organized analysis, and is not merely an impressionistic and formless approach. This section sets out the structure of this analysis, with a view to illustrating the ease with which it can be performed by legislative counsel.

Proportionality is commonly broken into three elements:

1. Effectiveness (whether the law achieves its purpose);
2. Optimality (whether there an obviously less intrusive way of achieving that purpose effectively);
3. Balance (whether there is obvious offensiveness).

Different jurisdictions will deal with these elements in different categories. For example, some jurisdictions treat proportionality as covering only the balance issue (otherwise known as "proportionality in the narrow sense"), and treat effectiveness and optimality (often labelled as "necessity") as separate issues. However, at a more fundamental level, any analysis of proportionality will deal with all three elements.

As we will see, it is the optimality part of the proportionality analysis which most concerns legislative counsel in their day-to-day work. However, we will work through all three elements in turn.

A recent case decided in Australia provides a useful illustration of all three elements. Before discussing these elements, it is worthwhile setting out the facts of this case. In *Momcilovic*[21] the Victorian Court of Appeal dealt with a statute that reversed the persuasive onus of proof in a serious drugs offence. While searching Ms. Momcilovic's flat, the police found illegal drugs (in a coffee jar and in the crisper and freezer of a bar fridge). Ms. Momcilovic said she wasn't aware of the drugs (noting that she did have a flatmate). Under section 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, she was taken to be in possession of the drugs unless she "satisfie[d] the court to the contrary". In the decision, this reversal of the onus of proof was seen to be a reversal of the *persuasive* burden of proof. Ms. Momcilovic was convicted of drug trafficking, sentenced to 2 years and 3 months imprisonment. On appeal, she argued that the reverse onus was incompatible with her right to a fair trial. The Victorian Court of Appeal agreed, and issued a statement of incompatibility. The case is currently on appeal to the High Court of Australia.

The main issue in the case was whether the reverse onus provision could be justified.[22] It clearly intruded into the protected area of the right to a fair trial. It could just as clearly be

[21] *Momcilovic v R* (2010) 265 ALR 751 (Victorian Court of Appeal).

[22] As discussed earlier, there is a theoretical question in human rights law as to whether the right to a fair trial is absolute, or whether it can be intruded upon by rules that are certain and proportionate: see text at footnote 10.

justified, on the basis of the need for special measures to combat the social dangers of illegal drugs. The real issues were whether the reverse onus satisfied the requirements of effectiveness, optimality and balance. Admittedly, the Victorian Court of Appeal did not use these labels in its judgement. However, the fundamental structure of its judgement turned on these issues.

Effectiveness

Effectiveness is a requirement of causality, involving an examination of whether the proposed law will in fact have its desired consequences. It is important to remember that there is no need for complete certainty here. Rather, only a degree of likelihood is required in most cases.[23] It is also important to remember that the primary judge of effectiveness is the Parliament, and not the executive, the legislative counsel or the courts. The primacy of the Parliament here is the consequence of the margin of appreciation doctrine mentioned above.

We can illustrate the effectiveness concept by looking at the *Momcilovic* case. The issue here was whether the reversal of the onus of proof, using a persuasive burden, was *effective* in achieving the purpose of combating drug crime. My own opinion is that the effectiveness criterion (leaving aside issues of optimality and balance) was clearly satisfied here. Reversing the onus of proof clearly makes it easier to achieve drug trafficking convictions. Nevertheless, the Victorian Court of Appeal took a slightly stricter approach, requiring the government to provide evidence of such a causal effect:

> In our view, this was a case where evidence was required. The mere assertion that the reverse onus was essential to the effective prosecution of trafficking offences could never have been sufficient by itself to establish that fact. ... The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision.[24]

This may be a valid approach for a *court* to take, especially in a case like this one where there is a substantial intrusion into the protected area of the right to a fair trial. However, this should not be the approach for *legislative counsel* in examining effectiveness. It is not for the legislative counsel to demand evidence of effectiveness from the government (although they may advise instructing officers to prepare such evidence if human rights issues are raised). For the most part, the legislative counsel merely examines whether a claim of effectiveness is plausible. For legislative counsel, this means that in almost all cases the

[23] There may be some cases where the degree of intrusion into a human right is so clear and so serious that a higher degree of effectiveness is required. This is likely, however, to be the exception rather than the rule.

[24] Para. 146.

effectiveness criteria will be satisfied. It would be odd indeed if a legislative proposal intruded on a human right, but the proposal had little chance of achieving its desired purpose.

Nevertheless, as a matter of rigorous analysis, it is worthwhile for legislative counsel to ask the effectiveness question. Merely asking the question may prompt instructors to consider whether the policy may be achieved by other, less intrusive means. In other words, asking the effectiveness question provides useful context for answering the other two proportionality questions, namely, the questions of optimality and balance.

Optimality

The optimality question is the most practical one for legislative counsel. Legislative counsel should ask whether there are alternative means of regulation that intrude less on the protected human right, while still achieving the desired purpose. If the legislative counsel is easily able to find such an alternative, he or she should warn the government. It is then the government's choice whether or not to respond to this warning.

As with all questions regarding proportionality, the legislative counsel needs always to consider the Parliament's margin of appreciation as providing the basic measure of the legislative counsel's role. The legislative counsel is not in the business of finding the best policy, but rather of identifying cases where there is an obviously better alternative: where the alternative achieves the desired result effectively, intrudes less on human rights and is relatively cost-effective. Clearly, the legislative counsel is not in an ideal position to make such judgements. This explains why the legislative counsel can only point out *obvious* problems with optimality.

The *Momcilovic* case is also a good illustration of the optimality concept. The legislation in question reversed the onus of proof of an offence in order to combat drug trafficking. The reversal of the onus was coupled with a *persuasive* burden of proof placed on the defendant. Was there an obviously better alternative measure that could achieve the same goal as effectively? The main alternative here was to maintain the reverse onus, but coupled only with the less demanding *evidential* burden of proof.

This issue is a fairly common one in jurisdictions with a binding Bill of Rights[25] and there is probably no simple one-fits-all answer to it. However, the extensive intrusion into a defendant's trial rights by such a measure suggests a restricted margin of appreciation for the legislature. Accordingly, courts are likely to engage in a more searching proportionality analysis in such cases. This may suggest a more active role for legislative counsel in warning the government about the human rights risks of reverse onus provisions (particularly when coupled with a *persuasive* onus of proof on the defendant).

[25] *Oakes* [1986] 1 SCR 103 (Canada); *Hansen* [2007] 3 NZLR 1 (New Zealand); *Johnstone* [2003] 1 WLR 1736, *Lambert* [2002] 2 AC 545, *Sheldrake* [2005] 1 AC 264 (UK).

In *Momcilovic*, the optimality question was pre-empted by an admission from a prosecution counsel:

> Far from submitting that the imposition of a reverse legal onus was essential to the task of successfully prosecuting trafficking offences, senior counsel candidly acknowledged that a change from a persuasive onus to an evidentiary onus would make little difference. Pressed by the Court, counsel eschewed any suggestion that a change of the onus from persuasive to evidentiary would make a major or demonstrable difference to drug trafficking prosecutions. As to the need for evidence, he submitted that empirical evidence of the efficacy of the persuasive onus would have been virtually impossible to obtain. It was mere speculation, he said, whether the outcome in a particular trial would have been different had the prosecution not been able to rely on a reverse legal onus.[26]

Once an admission of this kind is made, it seems to me that the optimality question is answered: there is undoubtedly an equally effective and less intrusive alternative (an evidential reverse onus). If the government makes such an admission, it follows that the legislation not only intrudes on the relevant human right, but also breaches it. Such an admission is likely to be rare!

Balance

The balance question will rarely be a major issue for legislative counsel. It is essentially a policy question: is the use of an intrusive measure so offensive that it must be a breach of human rights (even if it is effective in achieving its purpose and is the only way to achieve that purpose)? Thankfully, legislative counsel do not often have to deal with such proposals. When they do, the proposal is likely to be a big-picture issue, gaining the personal attention of politicians, the media and human rights experts.

One might also ask how an "unbalanced" policy can ever be "optimal". Consider a law which allows shopkeepers to shoot shoplifters, if this is the only way to stop them getting away with their loot. The law is effective: it definitely combats crime. The law is also optimal: it only allows shooting as a last alternative. It seems to me, however, that the law is unbalanced. This example is, admittedly, rather theoretical.[27] Perhaps its unlikelihood illustrates the rare nature of the balance question.

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[26] Para. 145.

[27] John Mark Keyes pointed out to me that a federal Canadian Bill (C-60 in the 3rd Session of the 40th Parliament) aims to give shopkeepers more flexibility in making citizens' arrests of shoplifters. This appears to be a 'big picture' issue in Canada, with very prominent media attention (e.g., see http://www.cbc.ca/news/canada/toronto/story/2011/04/07/lucky-moose-election.html). The Bill (a.k.a. the "Lucky Moose" Bill, named after a convenience store whose owner detained a shoplifter) may provide an interesting illustration of the interplay of effectiveness, optimality and balance.

In *Momcilovic* the court dealt with balance in a way that supported its findings on optimality:

> ... the combined effect of s 5 and s 72(1) is to presume a person guilty of the offence of possession unless he/she proves to the contrary. That is not so much an infringement of the presumption of innocence as a wholesale subversion of it. It was not suggested on the appeal that either the nature of the offence or the exigencies of prosecution could justify such a step.[28]

An interesting question is whether a legislative counsel should be able to give such an opinion about a legislative proposal. At first glance, the role of the legislative counsel might suggest the use of less powerful language. However, a legislative counsel would be fully justified in warning the government that a court may use such powerful language. Such language could cause the government substantial embarrassment. This kind of warning may be the most useful contribution a legislative counsel can make in discussions about balance.

Conclusion

This paper has been written from an Australian perspective – and this perspective is necessarily coloured by the absence, until recent times, of a formal Bill of Rights in any Australian jurisdiction. Australia's high standard of human rights protection has been achieved to date without such a Bill of Rights. However, recent human rights statutes in some Australian jurisdictions raise questions about the human rights role of legislative counsel in those jurisdictions. So far as the Australian Commonwealth is concerned, the Human Rights (Parliamentary Scrutiny) Bill might provide impetus for legislative counsel to develop new methods for dealing with human rights protection.

Legislative counsel from other jurisdictions may see these issues in a different light. In particular, legislative counsel in jurisdictions with a long-standing Bill of Rights may have already been wrestling with these issues for some time. In some cases, they may already play a substantial role in protecting human rights. Their enhanced role in human rights protection may indicate a future direction for the role of legislative counsel generally.

Whether or not legislative counsel deepen their role in human rights protection, their role will continue to be a light-touch one. Legislative counsel should be very careful about moving into substantial policy debates. Legislative counsel are not legislative gate-keepers, they do not decide which policy gains access to the Parliament. However, legislative counsel can and should notify the government where a proposed policy is likely to violate accepted human rights standards. Legislative counsel have a particularly important role to play here where the policy in question is a secondary one, and is not receiving public attention.

[28] Para. 152.

Legislative counsel can enhance their role here by moving from an ad hoc human rights approach to a more systematic approach. A first step would be to gain a good basic grasp of human rights law – which would not require much investment in time and training. As a result, legislative counsel would be able to carry out a rough analysis of intrusion and justification in the human rights context, and be able to make some conclusions about the certainty and proportionality of proposed legislation. This exercise would pick up obvious human rights problems in a systematic way. Part 3 of this paper demonstrates one possibility for developing a more systematic approach for legislative counsel to deal with human rights.

If legislative counsel can achieve this system, in a light-touch and tactful manner, they are likely to be rewarded for doing so. Legislative counsel are uniquely placed to pick up problems early in the legislative process. When problems are addressed early in the process, they cause a minimum of fuss and political embarrassment. For this reason, seasoned policy officers appreciate early warnings from legislative counsel. If legislative counsel can develop a useful early-warning system in respect of human rights, they will enhance their reputation both within and outside government. In other words, the legislative drafting profession can make substantial gains if it looks towards a more systematic approach to human rights protection.

Human rights are continuing to grow in importance both in the legal and political arenas. This trend is both international and domestic in nature. It is a trend that legislative counsel cannot ignore. Legislative counsel have tended to deal with human rights in an ad hoc manner – and in doing so have made very useful contributions to human rights protection. However, it may be time to review this ad hoc approach, and look to more systematic ways in which they can make such a contribution.
